PRECEDENTS
IN
CHANCERY,
BEING A
COLLECTION
OF
CASES,
Argued and Adjudged
IN THE
High Court of CHANCERY;
From the YEAR 1689, to 1722.

In the SAVOY:

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A TABLE OF THE NAMES OF THE CASES.

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DE Termino S. Hillarii, 1689.

In Curia Cancellariæ.

Cafe 1.
11 *January*, Lords Commiffioners *Maynard*, *Keck*, and *Rawlinfon*.

Back verfus *Andrews*.

2 Vern. 120. S. C.

A. Purchafes a Copyhold in his own, his Wife, and Daughter's Names, and afterwards furrenders it for the fecuring a Debt to *J. S.* *J. S.* not intitled to any Part of the Lands, it being an Advancement for the Wife and Daughter, and the Husband and Wife taking one Moiety thereof by Intireties.

J. S. purchafed a Copyhold to himfelf, his Wife, and his Daughter, and their Heirs, and afterwards furrenders this Copyhold to the Plaintiff, and his Heirs, for fecuring a Sum of Money, and dies; the Plaintiff brought this Bill to have the Eftate made good to him, and the Queftion was, Whether he fhould have any, or what Part of the Land?

For the Plaintiff, it was infifted, he ought to have the whole, for that the whole Purchafe-Money was the Money of *J. S.* and the Wife and Daughter were but Truftees for him; but at the worft he muft have the Husband's Share.

For the Defendant, it was infifted, that this Purchafe fhould be looked upon as an Advancement for the Wife and Daughter, and they not to be Truftees, and the Husband and Wife took by Intireties; and fo the Surrender of the Husband could pafs no Part of the Lands, and it being a Copyhold, the Plaintiff might have in-

 formed

formed himſelf how the Title ſtood; and of that Opinion were all the Commiſſioners; ſo the Bill was diſmiſſed, but without Coſts.

Caſe 2.

Gower verſus *Mead.*

25 *January.*

A. makes *B.* his Executor, and Deviſes to him 20 *l.* and his Real Eſtate to *J. N.* upon Condition that he pay his Debts and Legacies, the Perſonal Eſtate ſhall be applied in Eaſe of the Real, in diſcharging the Debts and Legacies.

A Man makes his Will, and *J. S.* his Executor, and gives him a Legacy of 20 *l.* and Deviſes all his Lands to *J. N.* and his Heirs, upon Condition, that he Pay his Debts and Legacies; and if the Debts were not Paid within two Months after his Death, and the Legacies within three Months, then the Creditors and Legatees might enter; and the only Queſtion was, Whether in this Caſe the Perſonal Eſtate ſhould be firſt applied in Eaſe of the Real Eſtate deviſed to *J. N.*

Serjeant *Phillips* for the Plaintiff argued, that the Perſonal Eſtate ſhould not be liable in this Caſe, and ſaid, it was the ſame, as if the Teſtator had deviſed Lands to *J. N.* upon Condition to pay 20 *l.* to *A* and 20 *l.* to *B.* and in that Caſe, without Queſtion, the Deviſee of the Lands could have no Advantage of the Perſonal Eſtate.

Serjeant *Hutchins*, for the Defendant. It is a ſettled Rule, that *Hæres Factus* ſhall have the Benefit of the Perſonal Eſtate, as well as the *Hæres Natus*; and tho' the Perſonal Eſtate had been deviſed to the Executor; yet if it were not ſaid, without being liable to Debts, it ſhould be applied, in Eaſe of the Real Eſtate; and to that Purpoſe was the Caſe of *Turner*, and *Zouch*, and *Cook*, and *Guavas* in the *Exchequer*; if a Man makes a Mortgage, and does not covenant to pay the Mortgage-Money; yet the Perſonal Aſſets ſhall be firſt applied in Eaſe of the Real Eſtate; and ſo it muſt be in the preſent Caſe.

Lord Commiſſioner *Maynard*. If a Man deviſes his Real Eſtate to another, upon Condition to pay his Debts, and does not diſpoſe of his Perſonal Eſtate, that ſhall be firſt applied in Eaſe of the Real Eſtate: And here the Condi-

tion annexed to the Devise, is not a Condition to avoid the whole Estate, but only to give an Entry to the Creditors and Legatees.

Keck. The Creditors have likewise a Bill now at hearing, and have a Demand primarily against the Personal Estate, and may certainly take their Remedy against that, if they please. Suppose in this Case there had been no Executor named, the Administrator must certainly have applied the Personal Estate in Ease of the Real; and the Executor does take no more to his own Use than an Administrator; therefore the Personal Estate must be applied.

Rawlinson. There is a Diversity betwixt *Hæres Factus*, and a Devisee of particular Lands; for a Devisee of particular Lands shall not have the Benefit of the Personal Estate, but *Hæres Factus* of the whole Estate shall.

Hæres Factus of the whole Estate shall have the Benefit of the Personal Estate, but a Devisee of particular Land shall not.

Devenish versus *Baines*.

Case 2.

BY the Custom of the Manor of *Yetminster Prima* in *Devonshire*, every Copyhold Tenant of that Manor, may, in the Presence of two Witnesses, nominate his Successor, and such Nominee shall enjoy the Lands after him for Life; and the Person who nominates may except any Part of the Lands to any other Person, yet the Nominee continues Tenant to the Lord for the whole, but the Person to whom any Part is excepted shall enjoy that Part during his Life; and if any Tenant dies seised, leaving a Wife, and makes no Nomination, then the Wife shall have the Tenement during her Life, else it goes to the Lord.

J. S. being a Copyholder of this Manor, and having a great Affection for the Plaintiff, who was his Godson, and intending to leave the greatest Part of his Copyhold to him, and the rest to his Wife, when he was sick, was

A Copyholder by his Will intending to give the greatest Part of his Estate to his Godson, and the other Part to his Wife; the Wife persuades him to nominate her to the whole, and that she would give the Godson the Part designed for him; decreed against the Wife, notwithstanding the Statute of *Frauds* and *Perjuries*.

was adviſing with ſome of the Copyholders of the Manor, how this might beſt be done, whether it were not beſt to nominate the Plaintiff his Succeſſor, with Exception of ſuch Part to his Wife as he intended for her; but the Wife being then preſent, pretended it might be prejudicial to her, as to the Part intended her, and that if he would nominate her his Succeſſor, ſhe would take Care the Plaintiff ſhould have ſuch Part of the Land as was intended him, and offered to give Security to that Purpoſe; thereupon *J. S.* nominates her Succeſſor, and dies; ſhe refuſing to let the Plaintiff enjoy the Lands intended him, he brought this Bill to have them decreed to him: The Defendant pleaded the Statute of *Frauds* and *Perjuries*, for that there was no Memorandum, *&c.* in Writing.

Serjeant *Hutchins* and others for the Defendant, inſiſted, that the Plaintiff could pretend to no Decree but upon the Wife's being a Truſtee for him, or her having agreed that he ſhould have them; and all Agreements concerning Lands, and all Truſts concerning Lands, muſt be, by the expreſs Words of the Statute, in Writing.

Serjeant *Phillips* and others for the Plaintiff, inſiſted, that Copyholders are not within the Statute, and that Caſes of like Nature have been decreed here; as in *Chamberlain*'s Caſe, which was this, The Father being about to make his Will, and thereby to make certain Proviſions for his younger Children; his Son and Heir-apparent perſuaded him not to make any ſuch Will, and that he would take Care his Brothers and Siſters ſhould have thoſe Proviſions; whereupon the Father forbore to make the Proviſions, and they were decreed againſt the Heir in this Court.

A Son and Heir Apparent perſuades his Father not to make a Will, which he intended to have made, and which was to contain Proviſions for his younger Children, promiſing to do for them himſelf: Equity will decree the Heir to give them ſuch Proviſions.

All the *Commiſſioners* were of Opinion for the Plaintiff, and ſaid, they decreed it not as an Agreement or a Truſt, but as a Fraud; and they were of Opinion, that ſeeing by the Cuſtom of the Manor an Eſtate might be

created by Parol without Writing, a Trust of such Parol Estate might likewise be raised without Writing, notwithstanding the Statute. And *Keck* said, that where a Tenant in Tail was about to suffer a Recovery, in order to provide for his younger Children, and had been kept from it, by the Issue in Tail promising to do it; it had been decreed in this Court.

Tenant in Tail is prevented by the Issue in Tail from suffering a Recovery, to provide for younger Children, by his promising to do for them himself: Equity will compel him to it, after the Father's Death.

Lord Viscount *Teviot* versus Lady *Spencer*, & al' & econt'.

SIR *Thomas Spencer*, by Fine and Recovery and Deed, dated o *May*, 12 *Car.* 2. settled the Manor of *T.* &c. on himself for Life, and after on Sir *Benjamin Maddox* and others, for 21 Years, to commence from his Death; and after that Lease, on *William Spencer*, his Son in Tail, with Remainder to his own right Heirs, and the Trust of the Term is thereby declared to be for raising 5000 *l* viz. 2000 *l.* for the eldest Daughter of Sir *Thomas*, that should be unmarried at the Time of his Death, and to be paid at her Age of 18 Years, or Marriage, which should first happen; and the other 3000 *l.* to be equally divided amongst his younger Children, to be paid at their respective Ages of 18 Years, or Days of Marriage, which should first happen: And in the Deed there was a *Proviso*, that if *William Spencer*, or any Issue Male of his Body, should pay or secure the 5000 *l.* according to the Deed, then the Lease to be void.

yet held that the Eldest should have 1000 *l.* more than any of the rest.

Afterwards *William* the Son died, and after Sir *Thomas* having no other Sons, made his Will, and thereby devised the Manor of *T.* &c. to his Wife for Life, for Increase of her Jointure, and she to pay 100 *l.* *per Annum* to his Sister, &c. and afterwards in the Will there was this Clause, *And thereby declare that I leave my Lands of Inheritance to descend to my Daughters, as my Heirs at*

 Law,

Law, on Account of my dying without Iſſue Male of my Body; and that the Lands hereby given to my Wife, or ſettled in Jointure on her formerly, ſhall not be charged with any Portions or Sums of Money to my ſaid Daughters, by Virtue of any former Marriage Settlement made by me.

Sir *Thomas* dies, leaving Iſſue four Daughters, all unmarried; the eldeſt Daughter afterwards married the Plaintiff; and this Bill was brought againſt the Lady *Spencer* and the other three Daughters and their Husbands; and the Truſtees to have the Benefit of this Term, and to have the 2000*l.* raiſed and paid to the Plaintiff.

The Defendants inſiſted, that the Settlement made by Sir *Thomas* was only intended to be a Proviſion for Daughters, in Caſe he had left Iſſue Male; and that failing, it ought in Equity to be ſet aſide, and no Uſe to be made of it: And the rather that Sir *Thomas*, who had an abſolute Power to diſpoſe of the Inheritance as he thought fit, had by his Will declared, that his Land ſhould not be charged with any Marriage Portion or Sum of Money for his Daughters, but that they ſhould have equal Benefit of it; and their Croſs Bill was to the ſame Purpoſe.

But the Lords Commiſſioners were all clearly of Opinion that the Plaintiff muſt have 1000*l.* more than the other Siſters; and that if the other three Siſters did not agree to pay her three fourth Parts of that 1000*l* out of their Shares of the Land, then the Truſtees were to raiſe the Money according to their Power; and the Lady *Spencer* was to be reimburſed out of the Inheritance, what her Eſtate for Life ſhould be damnified in this Matter.

Fowkes

Fowkes versus *Joyce.*

Case 5.
9 *February.*
2 Vern. 129.
S. C.

THE Defendant was owner of an Inn, and certain Lands belonging to it in *Barnet*, and had let that Inn and Lands to *J. S.* who was grown considerably in Arrear of his Rent. The Plaintiff was a Person who traded in Sheep and Cattle, and had sent his Servants with a Parcel of Sheep to be sold at *London*: In their Way they came to this Inn; and as they had usually done, by Leave of the Tenant, they put the Sheep into the Ground belonging to the Inn, to lodge for that Night.

The Servants of a Grazier driving a Flock of Sheep to *London*, are encouraged by an Inn-keeper to put the Sheep into Pasture Grounds belonging to the Inn: The Landlord seeing the Sheep, consents they shall stay there one Night, and then distrains them for Rent. Grazier relieved against this Distress.

Joyce the Landlord immediately comes down to the Ground, and pretended to be very angry that the Sheep were there; whereupon the Drivers said they were sorry if they had done any thing amiss, and if he pleased would take the Sheep out again, and give him any Satisfaction for the Time they had been there, which was not half an Hour; whereupon *Joyce* asked what they were to give a Night, they replied 8 *d. per* Night a Score; then said *Joyce*, if you be Customers to the Inn, you may let them be there to Night at that Rate; whereupon they were continued in the Grounds: And when the Servants came in the Morning to take them away, *Joyce* had distrained them for his Rent, so they replevied [illegible]. And Judgment being given for *Joyce* in that [illegible] in *C. B. Fowke* the Owner of the Sheep brought this [illegible] to be relieved against that Judgment, and was so.

The Court relied on this Reason, that when the Drivers offered to take the Sheep out of the Pasture again, at which Time they were not distrainable for the Rent, having not been *Levant* and *Couchant* upon the Lands, they were by the Fraud and Subtilty of *Joyce* induced to leave them there all Night, whereby they became liable to the Distress; and it was decreed for the Plaintiff with Costs, at Law, and in Equity.

Note;

Note; The Cafe of *Brodon* and *Pierce* was cited, where there being 20 Years Arrear of a Rent-Charge, and Cattle came by Efcape out of the next Ground, and were diftrained, &c. the Lord *Nottingham* relieved againft it in this Court.

Cafe 6.

Anonymous.

A. Devifes 1200 *l.* to his Wife, and gives her all the Goods, Chattels, Plate, Jewels, Houfhold-Stuff and Stock belonging to his Houfe at *N.* 400 *l.* which the Teftator had in ready Money in the Houfe, won't pafs by thefe Words.

IN this Cafe was cited the Cafe of one *Earles*, before Mr. *Juftice Jones*, fitting in the Abfence of my Lord *Chancellor*. A Man by his Will in Writing, devifed to his Wife 1200 *l.* in Money, and all the Goods and Chattels, Plate, Jewels, and Houfhold-Stuff and Stock upon the Ground, in and belonging to his Houfe in *N.* in which Houfe there was 400 *l.* in Money; and if this 400 *l.* fhould pafs by the Will, was the Queftion.

Decreed that it fhould not, for 400 *l.* is a confiderable Sum, of which the Teftator cannot be fuppofed to be mifcounfant of its being in the Houfe; then had he an Intent that that Money fhould have paffed, he would not have couched it under the general Words of all his Goods and Chattels, but would at firft have given her 1600.

Memorandum; *In* Eafter *Term a new Commiffion paffed for the Cuftody of the Great Seal; and Sir* John Trevor *and Serjeant* Hutchins *put in the Places of Sir* John Maynard *and Sir* Anthony Keck.

DE

Term. S. Trinitatis, 1690.

In Curia Cancellariæ.

Alathea Gofton, Widow and Relict of *Francis Gofton*, and *Francis Gofton* Adminiftrator of the faid *Francis* verfus Sir *John Mills*.

Cafe.

THE Cafe was this, the Inteftate *Francis*, about 1669, lent to *Edwin Sandys*, his Brother-in-Law, afterwards Lord *Sandys* 400 *l.* and the faid 400 *l.* being unpaid, and the Intereft of it greatly in Arrear. Lord *Sandys* makes his Will in Writing, and thereby devifes to his Brother-in-Law *Francis Gofton* 400 *l.* in full Satisfaction of all he can Claim from him, and devifes to the Plaintiff *Alathea* an Annuity of 25 *l. per Annum* during her natural Life; and after devifes all his Real Eftate to the Defendant and his Heirs, chargeable with the Payment of his Debts, and of the faid Annuity; the Plaintiff *Francis* refufes the Devife of the 400 *l.* and this Bill was exhibited to have the 400 *l.* and Intereft, and the Annuity devifed to the Plaintiff *Alathea*; and the Caufe being decreed to an amount, it appeared by the Mafter's Report, that there was due for the faid 400 *l.* and Intereft 800 *l.* and

2 Vern. 141. S. C. *A.* by Will devifes to *B.* 400 *l.* which was the Sum lent, in full Satisfaction of all the Moneys which he owed *B.* and fubjects his Real Eftate to the Payment of his Debts. The Debt which *A.* owed *B.* amounted, by reafon of Intereft to 800 *l.* but was barred by the Statute of Limitations: Court will fuppofe the Teftator miftaken in his Computation, and the whole Debt fhall be paid.

and the only Queſtion was, Whether the Lord *Sandys* Real Eſtate ſhould be charged with the whole 800 *l.* by Virtue of his Will.

The Defendant's Council inſiſted, that this being a Debt by ſimple Contract, it did not in its own Nature charge the Land; and therefore it can be no farther liable to it than the Will has made it, and that the Deviſor having given 400 *l.* in full Satisfaction of all Demands, is a plain Evidence, that either there was no more due, or at leaſt, that he intended to ſubject his Land to no more; and that this Caſe is the ſtronger, for that this Debt by the Length of Time was barred by the Statute of Limitations.

The Plaintiff's Council inſiſted, that the Deviſe of the 400 *l.* is no Evidence that there was no more due; and if the Lord *Sandys* did think that no more was due, yet it appears by the Maſter's Report that he was miſtaken, and he hath charged his Lands generally with the Payment of his Debts, and the Intereſt is as much a Debt as the Principal; and tho' it were once barred by the Statute of Limitations, yet it continues a Debt ſtill, and is as much within the Truſt of the Will, as any other of the Teſtator's Debts; and it does no where appear in the Will, that the Teſtator intended, that *Francis Goſton*'s whole Debt ſhould not be charged on the Lands, tho' it ſhould be more than 400 *l.*

All the *Commiſſioners* were clear, that the Land [illegible] be liable to the Payment of the whole Debt; [illegible] *Rawlinſon* put this Caſe, If a Man ſhould recite in the Beginning of his Will, whereas he was indebted to *A.* 300 *l.* to *B.* 400 *l.* to *C.* 500 *l.* &c. when, indeed, he owed *A.* 400 *l.* *B.* 500 *l.* and *C.* 600 l. and afterwards ſhould, by that Will, ſubject his Lands to the Payment of his Debts, would they not be liable to pay all that was due to *A. B.* and *C.* notwithſtanding the Teſtator's miſtaken Recital in the Beginning of his Will? Certainly they would; and the Caſe before us is the ſame.

A Man by Will recites his Debts, and then ſubjects his Real Eſtate for the Payment thereof, tho' he is miſtaken in ſome of the Sums recited, yet all his Debts ſhall be paid.

Knap versus *Powell*.

Case 8.

A Legatee who has no Notice of his Legacy till the Executor publishes it in the *Gazette*, shall have no Interest for it.

THE Plaintiff had a Legacy devised to him, payable within a Year after the Death of the Testator, who was his Half Brother; the Plaintiff knew nothing of the Legacy, nor of the Testator's Death, till the Executor publish'd it in the *Gazette*; and then he demanded his Legacy of the Defendant the Executor, and the only Contest was, Whether the Plaintiff should have Interest from the Time the Legacy should have been paid? The Court would not give any Interest, not so much as from the Time of the Bill exhibited; nor would they give Costs, even out of the Assets, but the bare Legacy.

Fisk versus *Fisk*.

Case 9.

2 *July*.

A Mortgage, tho' forfeited, and tho' the Heirs buy in the Equity of Redemption; and tho' no Defect of Assets, yet shall go to the Executor. But had the Heir been in by Descent of such forfeited Mortgage when he bought the Equity of Redemption, and no Defect of Assets, Equity would not take it from him.

THomas Fisk the elder, had a Mortgage in Fee, which was forfeited; he makes his Will, and devises all his Mortgages to *Thomas Fisk* the younger, and makes him Executor and dies: *Thomas* the younger proves the Will, and after dies intestate. The Plaintiff takes out Administration *de bonis non* to *Thomas* the elder, and also Administration to *Thomas* the younger, and brings this Bill against the Mortgagor; and the Defendant *Fisk* who was Heir at Law to *Thomas* the elder and younger, and had bought in the Equity of Redemption. This Cause was heard on Bill and Answer, and it was agreed that both the *Fisks* left sufficient Assets without this Mortgage, and the Bill was to have the Defendant *Fisk* to assign the Mortgage, and have the Money paid, or else to foreclose them.

And it was decreed, that the Defendant *Fisk* should pay the Plaintiff his Principal, Interest and Charges to a Day, or else assign the Mortgage, and be foreclosed; but my Lord Commissioner *Trevor* said, if the Mortgagee had been in Possession, and died so, he would not have taken

taken the Mortgage from the Heir, there being no Defect of Assets.

Case 10. 8 *July*.

Cordell versus *Noden*.

A. by Will gives several Legacies to his Relations, amounting to near the Value of his Estate, and makes *A.* and *C.* his Executors, and gives them 20*l.* and intreats them to take the Trouble of getting in his Estate. Testator lives ten Years after, and acquires an additional Estate. Decreed the surviving Executor but an Executor in Trust, and that the new acquired Estate should go to the Legatees in Proportion.

MR. *Cordell* being a Merchant, and having an Estate of about 2500*l.* and being about to go beyond Sea, in *December* 1674, makes his Will, and in the Beginning thereof desires his Mother, and the Defendant Mr. *Noden*, to take upon them the Trouble of being his Executors, and makes them Executors, and then goes on and sets down all the Particulars of his Estate, and casts them up, and then says, *All my Estate aforesaid, and whatever else belongs to me, I dispose of as follows*; and then devises a Legacy of 10*l.* to *Noden*, his Executor; and several other Legacies to his other Relations, to the Value of 2200*l.* and after the making of his Will goes beyond Sea, and lives about ten Years, and improves his Estate to about 5500*l.* His Mother dies, and several of his Relations to whom he had devised Legacies: And then the Testator dies.

The Bill was brought by the Relations, who were Legatees, against the Defendant the Executor, to have an Account of the Personal Estate, and to have the Surplus distributed amongst them: It was taken Notice of in the Case, that Mr. *Noden* had usually been a Trustee in the Family; that the giving him a particular Legacy, and the Words, desiring him to take the Trouble of the Executorship, and the Computation made of his Estate, and the devising all but so small a Part left for Contingencies and Funerals, was a plain Evidence that he intended no Advantage of an Overplus to the Executor.

The Commissioners were all of Opinion that the Surplus should be distributed; but in this Case not according to the Statute of Distributions, but according to the Proportion of each ones Legacy, devised to him by the Testator.

Attorney General of the Dutchy, at the Relation of Mr. *Vermuden*, Plaintiff, versus Sir *John Heath*, & al' Defendants.

Case 11.

In the Dutchy Chamber at *Westminster*, 9 *July*, Lord C. B. *Atkins*, and Mr. Justice *Ventris* sitting in Court. The Attorney General of the Dutchy Court exhibits an Information in Behalf of one Part-Owner of Coal Mines, against the other; Outlawry in the Relator is a good Plea.

THE Information set forth, that the Relator and Defendants were Part-Owners of several Coal-Mines in *Derbyshire*, that the King had a Duty of *Lott* and *Cope* out of all the Lead Mines there, that by the Custom, if one Owner were at Expence for the improving or working a Mine, all the Owners ought to contribute and bear their Part of the Charge; that the Relator had been at great Charges in making Soughs and other things for working and improving the Mines, without which they could not be wrought (and so the King would lose his Duty) and that the Defendant would not contribute or pay any Part of the Charge; therefore to make him account with the Relator, and pay his Part of the Charge, was amongst other things the Scope of the Information.

To this the Defendant pleaded an Outlawry in the *Relator*, and it was long debated, whether the Plea was good or not, and at length the Plea was allowed by both the Judges to be good; for tho' Mr. Attorney General be Plaintiff, yet the Relator is to have the whole Benefit or Loss of the Suit, and is himself Party to it, for it would abate by his Death, *&c.* and the King's Name is only made Use of by the Form of the Court, and he is not directly concerned at all, and very little by Consequence; and the Suit is not for the King's Duty, but the Relator's Interest.

White versus *Hussey* & al'.

Case 12.

THE Plaintiff and Defendant *Hussey* were Trustees in a Term for 99 Years, for raising a Sum of Money, and *J. S.* who had the Reversion, settled it

upon the Defendant *Hussey* and his Heirs, in Trust for his Mother (who had conveyed it before to him) for her Life, and after her Death, if he survived her, then in Trust for him and his Heirs; but if she survived him, then to her and her Heirs. Ten Years after, *White* lends a Sum of Money to *J. S.* (having had no Notice of this second Conveyance to *Hussey*) and takes a Mortgage of these Lands to Trustees; *J. S.* dies, his Mother surviving him: Then *White* sets up his Mortgage, and exhibits his Bill against the Mother of *J. S.* and the Defendant *Hussey*, to set aside the former Conveyance made by *J. S.* as being voluntary and fraudulent against him, and that therefore the Term of 99 Years might be wholly assigned to him, and he thereby enabled to raise the Trust Money, and his own Mortgage Money too; the Mother answers, and swears, that before her conveying the Estate to *J. S.* her Son, it was agreed between them, that he should make such Re-conveyance, and that the same was not made privately, or kept secret, nor was upon any Trust, and that she knew nothing of *White*'s lending any Money to her Son.

White proceeds no farther upon this Bill. The Mother makes her Will and devises this Land to *Hussey* and another of the Defendants for Payment of Debts and Legacies: Then *White* exhibits a new Bill to the same Effect, against them, who make the same Answer the Mother had done before, *viz.* setting forth her A[illegible], and that they believed it to be true.

Upon the hearing of the Cause, the Court unanimously decreed for the Plaintiff, tho' it was strongly insisted by the Defendants Council that they could not so do without directing a Trial at Law, whether the Settlement on *Hussey* were fraudulent or not, for that Fraud or not was triable only by Jury (especially where the Fraud, if any, was only from its being voluntary) and that if at Law the Jury should find the Fact specially, and submit it to the Court, they could make no Judgment

Not necessary to send it to be tried at Law, Whether a voluntary Conveyance be fraudulent or not? For a Court of Equity can determine it.

ment upon it; but it must be expresly found by the Jury to be fraudulent or not. But the Commissioners were all of Opinion they might decree a Conveyance to be fraudulent, meerly for being voluntary, and that without any Trial at Law: And so they did in this Case.

Martin versus *Long*.

Case 13.

A Man devised a Term for Years to *J. S.* his Heirs, Executors and Assigns for ever, but if he died before 21, leaving no Issue, then to *J. D.* The Devisee died before 21, without Issue, and the Remainder was held to be good.

A Devise of a Term to *A.* his Heirs, Executors and Assigns for ever, but if he die before 21 without Issue, Remainder over this Remainder is good.

Claxton versus *Claxton*.

Case 14.

MR. *Claxton* had made a Jointure to his Wife of several Lands in *Suffolk*, and after made his Will, and thereby devised these Lands to the Plaintiff and his Heirs, upon Condition to pay several Sums of Money to several Persons at several Days; and if he fail, then to *A.* and his Heirs upon the like Terms, and dies.

Equity will permit a Devisee of Lands, upon Condition to pay several Sums of Money, at a stated Time, to cut down Timber for that Purpose, during the Life of a Jointress.

Some of the Money being near due, and the Plaintiff not having ready Money, and fearing to lose the F[illegible] exhibited his Bill against the Jointress, and those that were to come in upon his Default, and pray'd that he might be admitted to fell Timber off the Estate, to pay the Money; and the Court without Difficulty decreed it accordingly.

DE
Termino S. Hillarii,
1690.
In Curia Cancellariæ.

Case 15.
27 *January*.

Tay versus *Slaughter*.

Tenant in Tail without levying a Fine, or suffering a Recovery, may appoint to a Charity, which shall bind him in Remainder.

TENANT in Tail settles Lands for a Charity, and in 1652 a Decree was made by the Commissioners of Charitable Uses for applying these Lands to the Charity; then the Estate Tail is spent, and *Tay*, who was the Remainder Man in Fee, and an Infant, put in Exceptions to the Decree, that he ought not to be bound by the Decree, not coming in under the Tenant in Tail.

But all the Commissioners were of Opinion that all Appointments of Tenant in Tail to a Charity, are by the Statute good and binding against the Remainder Man, as well as against the Issue in Tail; and therefore confirmed the Decree with Costs.

Case 16.

Wheeler versus *Newton*.

Sealing, not necessary to bring an Agreement out of the Statute of Frauds.

THE Plaintiff had articled with the Defendant for the Purchase of some Lands of his Wife's, and the Articles were in Writing, and signed by the Parties, but not sealed; but the Plaintiff was put into Possession of some Part of the Land; and therefore the Court

2 decreed

decreed an Execution of the Agreement, tho' it were not under Seal. And my Lord Commiſſioner *Rawlinſon* ſaid, that Agreements in Writing, tho' not ſealed, have ſome better Countenance ſince the Statutes of *Frauds* and *Perjuries* than they had before.

Fairbeard verſus *Bowers* and *Foxcraft*, & econt'.

Caſe 17.

2 Vern. 202. S. C.

A voluntary Judgment given by a Freeman of *London*, payable three Months after his Death, to be poſtponed to Debts by ſimple Contract, and to the Widow's cuſtomary Part, but will bind the Freeman's Legatory Part.

BOWERS being a Freeman and Citizen of *London*, and having three Baſtard Children by the Plaintiff *Fairbeard* (which Children were likewiſe Plaintiffs in the Cauſe) about two Years before his Death gave a Bond of 1000 *l.* to the Plaintiff, *Fairbeard*, conditioned for Payment of 500 *l.* within ſix Months after his Death, to be equally divided between the three Children, and after confeſſeth a Judgment upon that Bond defeazanced in the ſame Manner, and dies Inteſtate. The Defendant *Bowers*, who was his Widow, took out Adminiſtration to him.

This Bill was exhibited againſt her and *Foxcraft*, who was Creditor of the Inteſtate's Eſtate, to have a Diſcovery of Aſſets, in order to ſubject them to the Judgment. And *Bowers* had a Croſs Bill againſt *Fairbread*, &c. to be quieted in the Enjoyment of her Cuſtomary Part, and to have an Injunction againſt the Judgment.

As to *Fairbeard's* Bill, ſhe pleaded the Cuſtom of *London*, by which ſhe was intitled to a Moiety of her Huſband's Eſtate, after Debts and Funerals paid, and that ſhe had no other Proviſion but that, and that there was no Conſideration for the Plaintiff's Judgment; and being to be paid after *Bowers's* Death, it was but in Nature of a Legacy, and demurred to the Diſcovery.

In the hearing of theſe Cauſes the whole Court was of Opinion, that there was no Conſideration for entering into the Bond or Judgment (tho' it was urged, that by the Statute a Man is obliged to provide for his

Baſtard Children) and therefore being to be paid after *Bowers*'s Death, they reckoned it to be in Nature of a Legacy, and that all *Bowers*'s Debts, and the Widow's Cuſtomary Part, ſhould take Place before it (but my Lord Commiſſioner *Rawlinſon* ſaid he thought the Judgment ſhould be paid before other Legacies, if there had been any) ſo they decreed an Account of the Eſtate and perpetual Injunction againſt the Bond and Judgment, and that it ſhould be ſatisfied out of the Inteſtate's Cuſtomary Part, if ſufficient.

Caſe 17.

Hill verſus *Moor*.

A. puts out 1000 *l.* at Intereſt to the *E. I.* Company, and takes Bond for it in the Name of *J. S.* his Wife's Relation. *A.* becomes a Bankrupt; *J. S.* is ſummoned before the Commiſſioners before Examination; he tells the *E. I.* Company, that the Money was not his, but that they ſhould pay it to the Perſon that brought the Bond. *A.*'s Wife brings the Bond, and has the Money paid her. Equity will not relieve againſt it.

THE Defendant Sir *John Moor* was a Relation to Mr. *Hinton*'s Wife, and Mr. *Hinton* had put out 1000 *l.* at Intereſt to the *E. I.* Company, and taken a Bond for it in the Name of Sir *John Moor*; after a Commiſſion of Bankrupts was taken out againſt *Hinton*, and Sir *John Moor* was ſummoned before the Commiſſioners to be examined concerning *Hinton*'s Eſtate, who appeared before them, and deſired a Copy of the Interrogatories, and Time to conſider them, which being granted, Sir *John Moor* before his Examination, goes and tells the *E. I.* Company, that the Bond that was given by them to him for 1000 *l.* was not for his own Money, but they might pay it to ſuch Perſon as ſhould bring the Bond; and upon that *Hinton*'s Wife brings the Bond and receives the Money.

This Bill was brought by the Aſſignees of the Commiſſioners, to enforce Sir *John Moor* to pay the Money, but the Court would not relieve them.

Caſe 18.

Eccles verſus *Thawill*.

An Executor ſhall not redeem a mortgaged Term without paying a Debt contracted after.

THE Court declared in this Cauſe, that if a Man mortgages a Term, and afterwards becomes otherwiſe indebted to the Mortgagee, and dies; his Executors or

or Adminiſtrators ſhall never redeem, without paying the other Debts contracted after the Mortgage; but if they had been contracted before, they would have been intended to be included in the Mortgage. *Per Rawlinſon.*

Kingdome verſus *Boakes.*

Caſe 19.

One Witneſs againſt the Defendant's Anſwer, not ſufficient to ground a Decree on.

THE Bill was to diſcover, whether the Defendant, who was a Purchaſer of Lands, had not Notice of the Plaintiff's Title before his Purchaſe; the Defendant by his Anſwer poſitively denied the Notice; and the Plaintiff proved it by one Witneſs only. And it was held by the Court, that one ſingle Witneſs againſt the Defendant's poſitive Oath in his Anſwer, is not ſufficient to ground a Decree. So the Bill was diſmiſſed.

Sir *Edmund King* verſus *Withers,* & econt'.

Caſe 20.

A Scrivener who was employed to examine into a Title; fails in his Duty, by neglecting to make a thorough Inquiry, &c. whereby his Client is a Sufferer: Afterwards the Scrivener agree. to make him Satisfaction another Way. This Agreement decreed in Specie, tho' urged that there was no Conſideration.

WITHERS being a Scrivener employed by Sir *Edmund King*, did propoſe to him a Security for 800*l.* which was the Eſtate of one *Billingſly*, and the Title was carried to Council to peruſe, who approved the Title, if *Billingſly*'s Wife had ſuch a Jointure made her of other Lands, as would barr her Dower, and directed *Withers* to inquire, and ſatisfy him of that Matter. *Withers* never made any Inquiry, or at leaſt never gave any Anſwer to the Council, but told Sir *Edmund* that *Billingſly* was a very honeſt Man, and ſo prevailed on him to lend the Money; *Billingſly* died, and his Wife appeared to have a Jointure of thoſe mortgaged Lands. *Withers* purchaſed in the Jointreſſes Title; and when the Plaintiff clamoured and made loud Complaints againſt *Withers*, that he was like to loſe his Money by his Means, and expoſtulated the Matter ſharply with him at Sir *Edmund*'s Council Chamber, *Withers*, to appeaſe him, agrees to aſſign the Jointreſſes Eſtate in the firſt Place, to ſatisfy the Plaintiff Money, &c. and immediately reduced the Agreement into Writing him-

ſelf, and executes it by ſealing; but he afterwards refuſing to make it good.

This Bill was brought to compel him to it, and his Croſs Bill was to ſet aſide the Agreement, for that it was without Conſideration, and he threatned and frightned into it, and that he was not aware what he did when he did it: But the Court diſmiſſed his Croſs Bill, and decreed the Execution of the Agreement.

Caſe 21.

Wittingham verſus *Thornborough.*

A Policy of Inſurance being made an ill Uſe of, the Court decreed it to be delivered up.

THORNBOROUGH and others came to the Inſurance Office, and bought a Policy for the inſuring the Life of one *Horwell* (upon whoſe Life they had no Concern or Intereſt depending) for a Year; and the Policy ran, whether Intereſt or not Intereſted; and the *Premium* 5 *l. per Cent.* and they took this Way to draw in Subſcribers. They agreed with one *Marwood* a known Merchant upon the *Exchange*, and a leading Man in ſuch Caſes, to ſubſcribe firſt; but in caſe *Harwell* died within the Year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other Subſcribers.

Upon the Credit of *Marwood*'s ſubſcribing, ſeveral others (who had inquired of *Marwood* about *Harwell*, who was his Neighbour) ſubſcribed likewiſe. *Harwell* lived four Months, and then died, and this Bill was exhibited to be relieved againſt this Policy; and this Matter being all confeſſed by Anſwer, the Court decreed the Policy to be delivered up, and the *Premium* to be repaid, the Plaintiffs deducting thereout their Coſts.

The Court ſaid, this Way of Inſuring, was firſt ſet up for the Benefit of Trade, that when a Merchant happened to have a Loſs, he might not be undone by it, the Loſs by this Way being born by many; but if ſuch ill Practices were uſed, it would turn to the Ruin of Trade, inſtead of advancing it.

Palmer versus *Garrard*. Case 22.

A Person dies Intestate, leaving one Child: The whole Personal Estate belongs to him, within the Statute of Distributions.

THE Case was, *A.* died Intestate, leaving Issue only one Child, an Infant, Administration was committed to *J. S.* during the Minority of the Infant, who died within a Month after Age, the Plaintiff took out Administration *de bonis* of *A.* the Father, and brought this Bill against the Defendant, who had taken out Administration to the Infant to have an Account of the Personal Estate of *A.*

The Defendant pleaded the Statute for Distribution of Intestates Estates, that thereby the whole Personal Estate of *A.* became vested in the Infant, and so belonged to the Infant as his Administrator, and so he not accountable. And the only Question was, Whether the Statute did extend to this Case, there being no Persons to share the Estate, but one to have the whole.

All the Court were clear of Opinion that it did, and allowed the Plea, notwithstanding it was said that a Cause had been decreed to the Contrary in the Exchequer.

Rives versus *Rives*, & al'. Case 23.

What Proportion Tenant for Life shall bear of Incumbrances on the Estate.

THE Case was, G. *Rives* made a Settlement of his Estate upon himself for Life, then to Trustees for 99 Years, for raising 500 *l.* apiece for his three Nieces, to be paid at their respective Ages of 21 Years, and after to the Plaintiff for Life, with Remainder to his first Son in Tail, with divers Remainders over. The Plaintiff's Bill was to be let into the Possession of the Estate, paying his proportionable Part of the 1500 *l.* that was charged upon it, 500 *l.* of which was due in present, and the rest not in several Years.

The Court decreed, that the Plaintiff's Estate for Life should bear 700 *l.* and the Remainders the other 800 *l.* and that he should be let into Possession, paying the 700 *l.* but if the other 800 *l.* should, according to the

Limitations of the Truſt, become payable, during the Plaintiff's Life, he was to pay it; but then the Term for 99 Years, was to be his Security to reimburſe him again.

DE

Term. Paſchæ,

1691.

In Curia Cancellariæ.

Caſe 24. ### *Moor* verſus *Rycault.*

A Husband who had made no Proviſion on his Wife, agrees that her Fortune, which was in Truſtees Hands, ſhould be laid out in a Purchaſe of Lands. This Agreement, tho' after Marriage, not to be conſidered as voluntary, ſo as to be ſet aſide in Favour of a Creditor of the Husband.

A MAN ſteals a young Woman who had a conſiderable Portion, which was in Truſtees Hands: After the Marriage, her Friends would not part with the Portion, unleſs the Husband would give Security that it ſhould be ſettled for the Benefit of his Wife; and it was agreed that it ſhould be laid out in Land, to be ſettled to the Husband and Wife, and the Heirs of their Bodies; and a Judgment was given by the Husband for this Purpoſe.

Now this Bill was exhibited by a Creditor of the Husband, for that it was after Marriage, and voluntary, and ſo ought not to prevent a Creditor of his Debt.

But the Court would do nothing in it, for that if the Husband himſelf had exhibited a Bill here againſt the Truſtees for the Portion, the Court would not have decreed

creed it to him, without making ſome ſuch Settlement; ſo the Bill was diſmiſs'd, but without Coſts.

Symonds verſus *Rutter*.

Caſe 25.

THE Caſe was this, upon the Marriage of a Woman, 500 *l.* of her Portion, was put into Sir *Francis Child*'s Hands, upon Articles to this Effect, *viz.* that the Money ſhould remain in Sir *Francis* Hands, at Intereſt, to be laid out in Land, by the Conſent of the Husband and Wife, and the Survivor, and the Land to be ſettled on the Husband and Wife, and the Heirs of their two Bodies, the Remainder to the Heirs of the Body of the Wife, Remainder to the Wife's Brother, &c. and that till a Purchaſe had as aforeſaid, the Intereſt ſhould be paid to the Husband and Wife, and the Survivor of them, and the Aſſigns of the Survivor. The Wife dies without Iſſue; then the Husband dies: The Brother and Adminiſtrator of the Wife brings this Bill to have the Money inveſted in Land, purſuant to the Articles.

By Marriage Articles agreed, that 500 *l.* the Wife's Portion, ſhould be inveſted in a Purchaſe of Lands, to be ſettled on Husband and Wife for their Lives: Remainder to the Heirs of their two Bodies; Remainder to the Heirs of the Body of the Wife; Remainder to the Plaintiff, the Wife's Brother, in Fee. The Wife dies without Iſſue, and then the Husband dies, the 500 *l.* not being laid out. *Per Trevor* and *Rawlinſon*, This Money is not to be conſidered as Lands; but *per Hutchins* it is, and to go to the Perſon to whom the Fee is limited, and not to the Executor of the Husband.

But the Court, *viz. Trevor* and *Rawlinſon* were of Opinion, that the Money ſhould not be laid out in Land, but ſhould go to the Adminiſtrator of the Husband, for that there was no Child nor Creditor in the Caſe; that they did not take it to be the primary Intent of the Articles, to have Land purchaſed, there being no expreſs Agreement to purchaſe, but only that it might be purchaſed, if the Husband and Wife ſhould elect and agree to have it ſo.

But *Hutchins* was of a contrary Opinion, he thought the Intent of the Parties was, that Land ſhould be purchaſed, and that for the Remainder Man, the Court ought to decree it, and relied on the Caſe of *Annand* and *Honeywood*, *Withwick* and *Jermy*, *Attwood* and *Kettleby*, formerly adjudged in this Court.

Sir

Sir *Robert Brooks* verſus Lady *Brooks*, & al'.

Caſe 26.

Where the Husband may be Plaintiff againſt his Wife in Equity.

SIR *Robert Brooks* was Plaintiff againſt his Lady and others, and a Motion was made to have her committed, for not anſwering Interrogatories, but the Court would not grant it, and declared a Man could not be Plaintiff in this Court againſt the Wife. On *Saturday* following this Matter was moved again, and then the Court was of Opinion, that tho' a Man could not have a Bill againſt his Wife for Diſcovery of his own Eſtate; yet, where before Marriage ſhe enters into Articles concerning her own Eſtate, ſhe has made herſelf as a ſeparate Perſon from her Husband, and therefore ſhe was ordered to anſwer in a Week's Time.

DE

Term. S. Trinitatis, 1691.

In Curia Cancellariæ.

Burwell verſus *Harriſon*.

Caſe 27.

2 Vern. 231 S. C.

A. articles with *B.* to make him a Leaſe with uſual Covenants. *B.* brings a Bill to have the Leaſe made, he ſhall be at the Charges of the Repair, tho' uſual in that County for the Leſſor to be at thoſe Charges. *Secus forſan* if *A.* had been Plaintiff to have inforced the taking of ſuch Leaſe.

THE Defendant had entred into Articles with the Plaintiff, to make him a Leaſe of certain Lands in the County of *Norfolk* and Iſle of *Ely*, with uſual Covenants; and the Plaintiff brought this Bill to have a Leaſe made accordingly: And the only Queſtion was, Who ſhould be at the Charges of Repairs? 'Twas proved in the Cauſe, that in *Norfolk* and the Iſle of *Ely*, the Landlord did uſually covenant to repair; that when Lands there were lett without Leaſe, the Landlord did uſe to repair; that when the Defendant did laſt lett Part of the Lands in Queſtion, without Leaſe, he was at the Charge of all Repairs. Defendant pretended that the Lands were of a conſiderable better Value than the Rent reſerved, which was ſo ſmall, in regard it was intended the Plaintiff ſhould repair: But no ſuch Agreement or mutual Intention was proved.

The Court were of Opinion, that the Words *Uſual Covenants* ſhall be intended *uſual* all over *England*, and that the Leſſee being Plaintiff here to have a Leaſe, ſhould be obliged to repair, notwithſtanding the contrary Uſage in *Norfolk*, but that the Caſe might have

had

had a different Construction, if the Defendant had been Plaintiff to have enforced *Burwell* to have taken a Lease.

Case 28.

Offley versus *Offley*.

One settles a House on his Daughter for Life, with Remainders over, and then by Will devises the Goods and Furniture of the House to such Persons as were to have the House after his Death. By the Settlement, the Goods and Furniture shall go according to the Devise, and shall not be under the Power of the first Taker to dispose of, nor subject to her or her Husband's Debts.

THIS Cause came on amicably, and the Questions proposed were, 1*st*, *John Crew* owner of *Crew Hall*, had settled the said House by Deed executed in his Life, so that after his Death it would go to his Daughter for her Life, with several Remainders over; and by Will devised all the Goods, Furniture and Ornaments in *Crew Hall*, to such Persons as the said House was to go to after his Death, by Virtue of that Settlement. The Daughter marries Mr. *Offley*, who dies, not leaving Personal Estate sufficient to pay his Debts; and the Question was, Whether by this Devise, the Daughter had the absolute Property in the Goods at *Crew Hall?* for if she had, then by the Intermarriage they became Mr. *Offley*'s, and would be liable to the Payment of his Debts: But the Court were of Opinion, that she should have but such an Interest in the Goods as she had in the House, *viz.* the Use of them for her Life, and that Nobody should have an absolute Property in them but he that had an absolute Property in the House, by the apparent Intent of the Devisor.

Term raised to pay 200 *l.* *per Annum* Pin-Money to the Wife, with Covenants from the Husband for Payment of it. A Year's Arrear at the Husband's Death held such a Debt as should be charged on his Trust Estate settled for Payment of his Debts.

The 2*d*, Doubt was on the Marriage of Mrs. *Offley* with her Husband; there was a Term created for raising 200 *l. per Annum* for her Pin-Money, which Money had been constantly paid to her by her Husband's Steward, except only the last Year before his Death, which was in Arrear; and in the Settlement was a Covenant on the Part of the Husband for the Payment of it: And the Court were of Opinion, that this being an Arrear only for one Year, and there being a Covenant for the Payment of it, should be such a Debt as should be charged on his Trust Estate. *Secùs* if it had been in Arrear for many Years.

3*dly*, Whether Mrs. *Offley* ſhould have her Jewels and Chamber Plate, as her Paraphernalia? 'Twas ſaid that the Jewels and Plate had been bought with her own Pin-Money, and that the Value of them altogether did not amount to above 500 *l.* So the Court decreed them, being of ſo ſmall Value, in Reſpect of her Husband's Eſtate.

Jewels and Chamber Plate bought out of Pin-Money, allowed the Wife as her Paraphernalia.

4*thly*, There had been 600 *l.* laid out in Mr. *Offley*'s Funeral, which the Court decreed ſhould be a Debt to affect the Truſt Eſtate, Mr. *Offley* being a Man of a great Eſtate and Reputation in his Country, and being buried there; but if he had been buried elſewhere, it ſeemed his Funeral might have been more private, and the Court would not have allowed ſo much.

600 *l.* allowed for Funerals, in Reſpect of the Teſtator's Quality, and being buried in his own Country.

5*thly*, In Mr. *Offley*'s Marriage Settlement there was a Term for raiſing 10,000 *l.* for a Daughter, but it was ſo ſhort that the ordinary Profits of the Land would not raiſe above half the Sum; but there was a Coal Mine in the Land, which was open at Mr. *Offley*'s Death, which the Court ordered ſhould be wrought, and the Truſtees to have Power to make *Soughs* and *Drains* in any other the Lands of the Heir, as Need ſhould require, ſo as it were done in an orderly Manner, ſo that the Money might be raiſed. And my Lord Commiſſioner *Hutchins* ſaid, that in ſuch Caſe where the uſual Profits of the Land will not raiſe the Money appointed within the Time, this Court may order Timber to be felled off the Land to make it up.

Where the ordinary Profits of a Term are not ſufficient to raiſe a Portion, Timber may be felled, or a Mine worked for it againſt the Heir.

Sadd verſus *Carter*. Caſe 29.

LANDS were deviſed to the Defendant *Carter* and his Wife for their Lives, and after their Deceaſe to ſuch of their Children as ſhould be living at the Death of the Survivor of them, and to their Heirs,* equally to be divided between them, he the ſaid *Carter* paying 40 *l.* to the Plaintiff, *&c.* at a certain Time.

Deviſe of Lands to *A.* for Life, Remainder to ſuch Child or Children as ſhould be living at his Death, and to their Heirs, *A.* paying 40 *l.* to *B.*

The

* This is a Charge not only on *A.*'s Eſtate for Life, but alſo on the Remainder

The Court decreed the Land to be ſold for Payment of the Money, and then the Defendants to have ſuch a Proportion of the Overplus of the Purchaſe-Money as was anſwerable to their Intereſt for Life in the Land; for the Money deviſed is a Charge upon all the Eſtates.

Caſe 30.

Maw verſus *Harding*.

The Son of a dead *Uncle* not intitled to a Diſtribution with a living *Uncle*.

A Man dies inteſtate, leaving an *Uncle* and *Uncle's* Son, and the only Queſtion was, Whether the Son of the deceaſed *Uncle* ſhould come in for a Diſtribution with the living *Uncle*, by the Statute of Diſtributions: And all the Court were of Opinion that he ſhould not.

Caſe 31.

Freeman verſus *Freeman*.

A Man enters into Bond, that his Son, who was Tenant in Tail, ſhall not alien, and dies; the Son ſuffers a Common Recovery, and thereupon the Bond being put in Suit, the Bill was brought for Relief, but was diſmiſs'd with Coſts.

DE Termino S. Mich. 1691.

In Curia Cancellariæ.

Cass versus *Waterhouse*.

Case 32. 26 *October*.

A particular Writing for the Purchase of an Estate, no Writing within the Statute of *Frauds*, unless the Party purchased by it, or that it was shown him at the Time of Purchase; so that if that contains more than the Words of the Conveyance will in strictness carry, the Purchaser cannot compel a specifick Execution of the Residue on the Particular.

THE Case was, *Waterhouse* the Defendant was possessed of several Houses as Executrix to her Husband, for several Terms of Years, and which were in Mortgage at the Time of his Death; and there were likewise two other Houses which the Husband had purchased for Years in his own and his Wife's Names, which were not in Mortgage at his Death; after the Death of the Husband, the Defendant his Executrix gave out Particulars, wherein are contain'd, as well the Houses not in Mortgage, as those that were in Mortgage, in order to sell them, and were shown the Plantiff *Cass*, who had been much intrusted and advised with in all concerns of the Family.

Other Purchasers not bidding enough, *Cass* himself, who was a Creditor of the Husband, comes to an Agreement with the Defendant for the Purchase of all the Houses, and it was pretty evident in the Case, that all the Houses were taken by Plaintiff and Defendant to have been in Mortgage; and that the Defendant was not apprised that she had any Title to any of them in her own Right, and

upon the Plaintiff's Agreement there was a Conveyance executed of the Houses, but by the Words of it, it was restrained to such as were in Mortgage.

Afterwards, the Defendant being advised, that the Houses which were purchased in her Husband's Name and hers, came to her by Survivorship, and were not liable to his Debts; and that not being in Mortgage, they were not conveyed to the Plaintiff, she refused to let him have them, tho' it appeared in the Cause she had often said she had sold them, as well as the rest, to the Plaintiff, and he had paid the Taxes for them; so this Bill was brought to have the Houses conveyed, and to have a farther Assurance of the others according to a Covenant.

But the Bill was dismissed, as to all but the making farther Assurance; for tho' the Court seemed satisfied, that the Defendant had covenanted to convey all to the Plaintiff, and thought she had so done, yet there being no Agreement in Writing, as to the two Houses not comprised in the Conveyance, the Statute of *Frauds* and *Perjuries* stood so full in their Way, that they could not decree the conveying of them; for tho' the particular were in Writing, and these two Houses mentioned in it, as well as the others; and tho' it was proved, that that particular was shewed to the Plaintiff, yet it was not proved to have been shewn to him on his Purchase, nor that he purchased by it.

Case 33. 27 October.

Bentham versus *Haincourt*.

A. Mortgages to *B.* and after to *C.* then *B.* enters, and after suffers *A.* the Mortgagor to receive the Profits for several Years, without requiring Interest. This Interest shall not be charged on the Lands to keep out *C.*

IT was held by the Court in this Case, that if a Mortgagee after Notice of a Subsequent Mortgage joins with the Mortgagor in Sale of the Lands to a Stranger, the Money received by either for the Purchase, shall sink so much of the Purchase Money: And in this Case the Mortgagor being Son-in-Law to the Mortgagee, and he having entered, and afterwards suffered the Mortgagor to

to take the Profits for ſeveral Years, without requiring Intereſt.

The Court held, that the Lands in the Hands of the ſecond Mortgagee ſhould not be charged with any Intereſt for that Time, that is, that the Intereſt of the firſt Mortgagee ſhould not affect the Lands, ſo as to keep out the ſecond Mortgagee longer than he would have him, if the Intereſt had been duly paid.

Coningham verſus *Melliſh.*

Caſe 34. 28 October

Deviſe of Lands to his Couſin *A.* and his Heirs in Truſt, to be ſold for Payment of his Debts and Legacies and makes *A.* Executor, The Surplus after Debts and Legacies no reſulting Truſt for the Heir, as it would have been on a like Caſe, on a Conveyance executed.

J. S. by Will deviſed thus. *I give and bequeath unto my Cozen* Thomas Melliſh *all that my Meſſuage, called the* Star *in* Chicheſter, *to have and to hold, to him, his Heirs and Aſſigns for ever, in Truſt, to be ſold for the Payment of all my Debts and Legacies within a Year after my Death,* and makes *Thomas Melliſh* his Executor. The Plaintiff was Couſin and Heir to the Deviſor, and ſought by this Bill to make the Surplus after Debts paid a Truſt for him.

Rawlinſon and *Hutchins* being only in Court, the latter held clearly, it was no reſulting Truſt, the former doubted.

Afterwards, *Friday* the 30th Inſtant, the Caſe was again debated; the Argument to make it a reſulting Truſt was, that upon a Conveyance executed, it would have been ſo, and there could be no Reaſon why, being by Will ſhould alter the Caſe.

The Argument againſt it was, that 'tis plain the Teſtator had a Regard and Kindneſs for *Thomas Melliſh,* his *Couſin* (as he calls him, in his Will) who was as near of Kin to him as the Plaintiff, that is, his Heir; but if the Surplus of the Land ſhall be conſtrued to reſult to the Heir, the Conſequence would be, that *Thomas Melliſh* the Executor ſhould have nothing but his Labour for his Pains; for if there be a reſulting Truſt for the Heir, the Perſonal Eſtate muſt, by the Rules of this Court, be in

in the first Place applied towards Payment of the Debts in Ease of the Lands, and so *Thomas Mellish* would not have any Thing, either as Executor or Devisee.

Wherefore the said two Commissioners held it no resulting Trust, but decreed the Heir to join in Sale of the Land.

Case 35.

Vernon versus *Jones.*

2 Vern. 241. S. C.

One by Will devises Lands to Trustees in Trust to pay 200 *l. per Ann.* Rent-Charge to his Wife for Life, for her Jointure, and other Legacies and Charges thereout. After which he and his Wife join in a Mortgage for raising 8000 *l.* and Levy a Fine accordingly, and he executes a Deed of Trust to sell for Payment of Debts, and the Surplus to be to him and his Heirs; yet after his Death all this held no Revocation, but only *pro tanto*, so that the Wife allowed to come in for her 200 *l. per Ann.* and the other Legacies and Charges to take Place, if sufficient, if not, in Proportion.

SIR *Thomas Vernon* had mortgaged his Estate for Years, and then married, and afterwards made his Will, and devised all his Lands to Trustees upon Trust to sell (except his Capital Messuage, *&c.*) to pay certain Debts, and afterwards to raise 200 *l. per Ann.* Rent-Charge, out of the excepted Lands, for his Wife for Life, for her Jointure, provided she release her Dower; and also to raise certain Portions for his Daughters, and a Maintenance of 100 *l. per Ann.* for his eldest Son, and soon after he makes another Mortgage for 8000 *l.* and the Wife *Jones* in a Fine upon this Mortgage; and about the same Time he makes a Deed of Trust, whereby he conveys all his Lands to several Persons (who were Sureties for some of his Debts) in Trust to sell all or any Part for Payment of his Debts, and that afterwards the Surplus shall be to him and his Heirs.

Afterwards Sir *Thomas Vernon* dies without new Publication of his Will; and the Question was, Whether by this Mortgage Fine and Deed of Trust, subsequent to the Will, that be so revoked, or the Wife so barred, that she shall not claim the 200 *l. per Ann.* thereby.

It was urged for the Plaintiff, that this Mortgage and Fine subsequent to the Will, were without doubt a Revocation of it in Law, and that there was no Reason why Equity should relieve against it, and that the Deed of Trust made the Case much stronger; for whereas by

3 his

his Will he had subjected his Lands (with Exception of some Particulars) to be sold, for Payment of Debts, and made those excepted Lands a Fund to raise 200 *l. per Ann.* for his Wife's Fortune: Now by this subsequent Deed of Trust he had subjected those excepted Lands, as well as the rest to be sold for the Purposes in that Deed, and so had destroy'd the Fund upon which the 200 *l.* was by his Will to be raised for his Wife, and had declared the Surplus of all, after Debts paid, and his Trustees indemnified, to be to himself and his Heirs, and to obviate any Objection which might be made, as if the Wife's having a Right of Dower, might be a Consideration for the 200 *l. per Ann.* given by the Will, and so she a kind of Purchaser: It was said, there was a Mortgage upon the whole Estate before the Intermarriage, and so the Wife's Title of Dower of no Consideration at all, or if it were, she had barred herself thereof, by joining in the Fine upon the second Mortgage.

On the other Side, it was said, that notwithstanding the Mortgage, which was precedent to the Marriage; yet, that being but for Years, the Wife was intitled to her Dower, and would then be intitled in Equity to redeem the Mortgage on Payment of her Proportion of the Mortgage Money; and that the 200 *l. per Ann.* was devised to her by the Will, upon Condition, that she should extinguish her Dower, which she had done by joining in the Fine upon the second Mortgage, and shall be intended to be done in Compliance with the Direction of the Will; and therefore ought not to be turned to her Prejudice, that the subsequent Deed of Mortgage and Fine, and the Deed of Trust being all made for particular Purposes; shall not be intended a Total Revocation of the Will, but only *pro tanto*, and to serve those particular Purposes; and several Cases were cited to that Purpose, as the Case of *Hall* versus *Dench*, which was decreed at the *Rolls*, and after affirmed in Court, and was to this Purpose: A Man makes his Will, and devises certain

One makes his Will, and thereby devises certain Lands, which he afterwards Mortgages. This no total Revocation of the Will.

certain Lands, and after, mortgages them in Fee; yet held that this Mortgage shall not be a total Revocation of the Devise, but only to let in the Mortgage: And Mrs. *Danby*'s Case was remembred, where she joined with her Husband in a Fine, in making a Mortgage, which afterwards did not proceed; then her Husband died, and she brought a Writ of Dower, and got Judgment by Default, and the Heir could not be relieved against it here, as he certainly would have been, if that Fine had been a Barr of her Dower in Equity, as it was at Law. Some Cases also were cited, where even at Law several Deeds and Acts shall be accounted but as one, and therefore it has been adjudged, that where a Man has a Power to revoke Uses by Deed, and he levies a Fine of the Lands, and afterwards declares the Uses by Deed, tho' this Fine of it self singly would have been an Extinguishment of the Power of Revocation; yet the Deed that comes after shall be coupled with it, and be accounted but one Act.

All the three Commissioners were of Opinion, that neither the Mortgage and Fine, nor Deed of Trust, shall be a total Revocation of the Will being made for particular Purposes; but that after Debts paid, the Widow shall have her 200 *l. per Ann.* and the younger Children their Portions, if the Estate were sufficient to pay all; and if not, to be paid in Proportion.

Case 36.

Martin versus *Woodgate*.

13 *November*.

Devise of the Rents and Profits of Lands till his Son attain 21 towards Payment of Debts; and if my Son die before 21, my Debts being paid, then to *A.* and the Son dies before 21; yet the Rents and Profits not only till he would have attained 21, but also beyond, till the Debts be paid, shall be applied for that Purpose.

A. Devises all his Goods, Chattels, and Stock to his Wife (whom he makes Executrix) for Payment of his Debts, and afterwards devises the Rents and Profits of all his Lands to her, till his Son *J.* should attain his Age of 21 Years, or marry, towards Payment of his Debts, and then has these Words; *and if my Son die before his Age of* 21, *or without Issue, my Debts being paid, then*

then I Devise to J. S. *in Tail, he paying* 100 l. *&c.* The Son dies before 21, without Issue, and the Profits to the Time the Son would attain to that Age, are not sufficient to pay all the Debts; and the Question was, Whether the Profits beyond that Time should be liable to the Debts.

Rawlinson and *Hutchins* (who were only in Court) held, they should; for upon the whole Will, they took it plainly to be the Intent of the Testator, that all his Debts should be paid out of his Lands: *Rawlinson* admitted, that if the Testator had only devised the Profits till his Son should be 21, towards Payment of Debts, and had gone no farther, that it should have been carried no farther, than till the Son would have attained to that Age; but *Hutchins* was of Opinion, that even in that Case the Profits should be applied to pay the Debts beyond the Age of 21, if those to that Time were not sufficient to discharge them all.

Raw & Ux' and *Eliz. Potts*, Relict of *Leonard Potts* versus *John Potts*.

Case 37.
14 November.

A. Tenant in Tail, remainder to *B.* in Tail. *A.* not knowing of the Intail makes a Settlement on his Wife for Life for her Jointure, which *B.* who knew of the Intail, engrosses; and after the Death of *A.* recovered on Ejectment against his Widow; but in Chancery relieved, and a perpetual Injunction granted for this Fraud in *B.* in concealing the Intail, which if it had been disclosed, the Settlement might have been made good.

THE Case was, *J Potts*, Grandfather of *Leonard*, and of the Defendant, 16 *Jac.* 1. settled the Lands in Question, on his eldest Son in Tail Male, Remainder to the Heirs Male of his Body, *&c.* and dies; his eldest Son had Issue *Leonard* and *John*, and dies; *Leonard*, who, for ought appeared, knew nothing of this Intail, married; and on his Marriage settles these Lands on his Wife for her Jointure, and the Issue of that Marriage, without levying a Fine, or suffering a Recovery.

John, the Defendant, who knew of this old Intail, and had the Deed in his Custody, engrossed his Bother's Marriage Settlement, but never made any Discovery of the Intail.

Leonard's Wife dies without Iſſue, and he grants a Rent-Charge out of theſe Lands to his Brother, which was conſtantly paid; and afterwards marries another Wife, the now Plaintiff, and Settles the Lands on her, in the ſame Manner, as on his former, without Fine or Recovery..

The Defendant *John*, likewiſe engroſſes this Settlement; but never mentions any Thing of the old Intail; becauſe, as he confeſſed in his Anſwer, if he had ſpoke any Thing of it, his Brother, by a Recovery might have cut off the Remainder, and barred him.

Afterwards *Leonard* and his Brother diſagreeing, *Leonard* treats a Match for his Nephew *Raw*, the Plaintiff and his Wife, and (having no Children of his own) propoſes to ſettle this Eſtate upon them, but died without Iſſue before the Marriage took Effect, having firſt made his Will, and thereby deviſed his Lands after the Death of the Plaintiff *Eliz.* to the Plaintiff *Raw*, and his Heirs. Afterwards the Marriage takes Effect, and *Raw* ſettles theſe Lands upon his Wife, and the Iſſue of that Marriage.

After the Death of *Leonard*, the Defendant *John* brings an Ejectment againſt *Eliz.* and by Virtue of this Deed of Intail, Evicts her Jointure.

Whereupon She, and *Raw*, and his Wife, brought this Bill to be relieved, and the Plaintiff *Eliz.* was relieved; for it appearing, that the Defendant was privy to her Marriage, and ingroſſed the Settlement, and at the ſame Time knew of the old Intail, and did not diſcloſe it, which if he had done, her Settlement might have been made good and firm in Law; therefore the Court decreed the Defendant to confirm her Jointure, and granted a perpetual Injunction againſt the Judgment in Ejectment, but could not relieve *Raw* or his Wife, becauſe he was but a voluntary Deviſee; and it did not appear that the Defendant was privy to that Marriage till after the Solemnization of it, and ſo not Guilty of any Fraud, as to them; and this Decree was afterwards affirmed in the Houſe of Peers.

Lumley versus *May* & al'.

Case 38.

One Devises all his Goods, Chattels, and Estate whatsoever, on Condition to pay his Debts and Legacies, these Words pass his Real Estate, he having by Will devised a considerable Legacy to his eldest Son, and other Legacies, and the Surplus of his Estate after his Wife's Death to be equally divided between his four Children

RIchard May seized of Free-hold and Copy-hold Land, surrenders to the Use of his Will, and then devises to his Wife all his Goods, Chattels, and Estate whatsoever, upon Condition, that she paid his Debts and Legacies; and by the Will devised 600 *l.* to the Defendant *May* his eldest Son and Heir, and 400 *l.* to the Plaintiff *Eliz.* his Daughter, and other Legacies to other People; and the Surplus of his Estate after his Wife's Death to be equally divided between his four Children, and made his Wife Executrix, and died, leaving the Defendant, his Son, an Infant, the Wife dies before Probate of the Will.

This Bill was brought by the Creditors and Legatees to have the Estate sold to pay them, and the Court was of Opinion, that the Words *Goods, Chattels, and Estate whatsoever*, with all the other Circumstances of the Case, and the Personal Estate falling short, would pass his Lands well enough, and decreed a Sale, and the Heir to join when he came of Age; but he being an Infant, they gave him a Day to shew Cause after he came of Age.

Scoolding versus *Green*.

Case 39.

Devise of 100 *l.* to *A.* and *B.* viz. 50 *l.* to *A.* and 50 *l.* to *B.* payable at such a Time, and if either die before the Time, then the 100 *l.* to the Survivor, the whole 100 *l.* decreed to the Survivor, notwithstanding the severing Clause, which holds only in Case both live to the Time of Payment.

A Man devises 100 *l.* to *A.* and *B.* the two Daughters of his Brother *Green*, to be paid within a Year after the Death of his Wife, *viz.* 50 *l.* to *A.* and 50 *l.* to *B.* if they shall both be alive at the Time of Payment; but if either of them shall die before, then the said 100 *l.* to the Survivor of the said two Daughters: One of the said Daughters died in the Life-time of the Devisor, and the only Question was, Whether the surviving

viving Daughter ſhould have the whole 100 *l.* or only the 50 *l.*

Rawlinſon and *Hutchins* were clearly of Opinion, that ſhe ſhould have the whole 100 *l.* they ſaid, that by the firſt Clauſe of the Will it is a joint Deviſe to them of the 100 *l.* in which Caſe, if the Will had gone no farther, if one had died, it would have ſurvived to the other then the *viz.* that comes after, is only a Severance of it, in Caſe they ſhould both live to the Time of Payment, which they did not; and then the laſt Clauſe of the Will, if either died before the Time of Payment, is a new Subſtantive Deviſe of the whole 100 *l.* to the Survivor, and decreed accordingly.

DE Termino S. Hillarii. 1691.

In Curia Cancellariæ.

Fosset versus *Austin*.

Case 40.

Tenant in Tail suffers a Recovery to lett in a Mortgage of 500 Years, and then limits the Land to the old Uses, and by Will devises all his Lands for Payment of Debts; the Equity of Redemption of this Mortgage held Assets to satisfy Creditors, or for a subsequent Grantee of an Annuity.

TEnant in Tail suffers a Recovery to lett in a Mortgage of 500 Years, and then limits the Land to the old Uses, and makes his Will, and devises all his Lands for the Payment of his Debts.

The Court thought, that the Equity of Redemption of this Mortgage should be Assets to satisfy Creditors, or a subsequent Grantee of an Annuity.

Note, The Redemption was limited to him, his Heirs or Assigns.

Holmes versus *Buckley*.

Case 41

23 *February*.

Baron and Feme grant a Water-course through the Feme's Lands, with Covenants for them, their Heirs and Assigns, to cleanse and keep it in Repair, and suffer a common Recovery to establish the Grant. This not a Personal Covenant, as to the Baron and Feme, but a Covenant which runs with the Land, and shall bind the Assignees, being made good by the Recovery.

ANthony *Bottely* and *Katharine* his Wife, being seized in Right of the said *Katharine*, of two Pieces of Ground by Indenture, 25 *Jan.* 1622, did grant a Water-course to one *John Howland*, and his Heirs, through the said two Pieces of Ground; and by that Deed did Covenant for

for them, their Heirs and Aſſigns, from Time to Time to cleanſe the ſame; and that all Fines and Recoveries levied and ſuffered, and to be levied and ſuffered of the ſaid Grounds, ſhould be and enure for the ſtrength'ning and confirming the ſaid Water-courſe, according to the ſaid Grant, and afterwards, the 30th of the ſame Month, join in a Deed, declaring the Uſes of the Recovery to be ſuffered of the ſaid Ground; and that the ſame ſhould enure to the ſtrengthning and confirming the Water-courſe granted by the ſaid Indenture of the 25th of *January.*

The Water-courſe, by Meſne Aſſignments, came to the Plaintiff; and the ſaid two Pieces of Ground to the Defendant, who built upon the ſame, and much heightened the Ground that lay over the Water-courſe, and made it much more inconvenient and chargeable to repair, and as it was alledged (and in Part proved) the building had much obſtructed the ſaid Water-courſe; ſo the Bill was, to be eſtabliſhed in the Enjoyment of the ſaid Water-courſe; and that the Defendants, and all claiming under them, might from Time to Time cleanſe the ſame, according to the ſaid Covenants.

It was objected for the Defendants, that the ſaid Covenant being a Perſonal Covenant, and made by a Feme Covert, could in no Sort bind the Defendants; and that, tho' the Recovery had made good the Grant of the Water-courſe, yet that this Perſonal Covenant was not at all ſtrength'ned or bettered by it; and that the Plaintiff, and thoſe under whom he claimed being ſenſible of it, had for 40 Years cleanſed the ſame at their own Charges.

But the Court was of Opinion, that this was a Covenant that run with the Land, and tho' made by a Feme covered, was ſtrength'ned and made good by the Recovery, and ſaid, tho' the Plaintiff had cleanſed the ſame at his own Charge, whilſt it was eaſy to be done, and of little Charge; yet ſince the Right was plain upon the Deed, and the cleanſing made chargeable by the Building, it was reaſonable the Defendants ſhould do it, and decreed accordingly, and gave the Plaintiff his Coſts.

DE
Termino Paſchæ,
1692.
In Curia Cancellariæ.

Cotton verſus *Cotton* and *Aſhton*. Caſe 41.

Feme *Ceſtui que Truſt* of a Bond marries Principal Obligor, and after his Death the Bond being put in Suit againſt the Surety, he could not be relieved in Equity, becauſe like the Caſe where Husband before Marriage joins in aſſigning the Woman's Perſonal Eſtate in Truſt for herſelf, tho' urged it was a Releaſe in Equity, as the Obligee's marrying the Obligor is a Releaſe at Law.

THE Defendant *Cotton* in her Widowhood, lent 200 *l.* being Part of the Aſſets of her firſt Husband *Gibbons* to *J. Cotton* the Plaintiff's Son, who together with the Plaintiff as his Surety, became bound to the Defendant *Aſhton* (in Truſt for the other Defendant *Cotton* then *Gibbons*) for the Repayment of the Money. Afterwards Mrs. *Gibbons* intermarried with the Principal Obligor, who afterwards died, and left his Wife wholly unprovided for, and this Bond being put in Suit.

The Plaintiff brought his Bill to be relieved againſt the Bond, for that the *Ceſtui que Truſt* in the Bond having intermarried with the principal Obligor, that in Equity was as much a Releaſe and Diſcharge of the Bond as it would have been at Law, if the Obligee herſelf had married the Obligor; and that the Bond being a Truſt for her after Marriage, was a Truſt for the Obligor her Huſband, and therefore ought not now to be made Uſe of.

But the Court would not relieve against the Bond, for they said that the Husband himself being one of the Obligors, and so privy to this Trust for his Wife before Marriage, makes it like the Case where a Man joins with the Woman he is about to marry, in assigning her Personal Estate in Trust for herself, in which Case he shall not have the Benefit of it; or if it should be not so taken; yet because the Husband lived with her two Years, and was Party to the Bond, and did not procure it to be delivered up and discharged, and was now dead, and had left his Wife wholly unprovided for, this Court would not hinder her of this Means of providing for herself.

Case 42.
2 Vern. 262. S. C.

Battcley & al' versus *Cook* & al'.

Church-wardens having by Order of Vestry laid out several Sums for Repairs of the Church, and building two new Galleries, and having at going out of their Office their Accounts taken by Auditors, and passed and allowed by the Vestry, and an Order of Vestry for making a Rate to reimburse them, brought a Bill against the succeeding Church-wardens to enforce the making such Rate; but those Church-wardens being likewise removed, after Examination of Witnesses and Publication passed, held a good Objection at the hearing, and that they had no Remedy but in the Spiritual Court, or against the Parishioners in particular who employed them.

PLAINTIFFS were late *Church-wardens* of the Parish of St. *James*, in *Bury*, *Suffolk*, and during the Time of their Office, had, by Order of the Vestry, expended several Sums of Money in repairing the Church, and erecting two new Galleries for the Use of the Parishioners, and several Sums of Money had, by Order of the Vestry been collected towards reimbursing them, and they had received more than the bare Repairs did amount to; but at their going out of their Office, their Accounts being taken by Auditors appointed by the Parish, and afterwards passed, and allowed by the Vestry, there remained due to them 130 *l.* and upwards; and the *Vestry* made an Order, that a Rate should be made for reimbursing them that Money; and then the same *Vestry* chose *Cook* and another of the Defendants Church-wardens for the Year ensuing, who refusing to make any Rate for reimbursing the Plaintiffs, they brought this Bill against the said Church-wardens, and others of the Parishioners, to have a Rate made pursuant to the said

2

ſaid Veſtry Order, and to be relieved and paid the Money due to them.

After the Plaintiffs had examined their Witneſſes, and before Publication, Defendant *Cook* and his Partner were removed from being Church-wardens, and new ones choſen; and this was objected to the Plaintiffs at the hearing of the Cauſe.

Hutchins thought it a material Objection; but it was anſwered for the Plaintiffs, that there could never be any Remedy againſt a Pariſh in any Caſe, for they would be ſure either to remove the old Church-Wardens and chuſe new ones, or delay the Cauſe till their Time was out.

Trevor ſaid the change of the Church-wardens would be no Objection, if the Nature of the Caſe were ſuch as the Court could give Relief in; but the Plaintiffs having received as much and more than had been laid out in Repairs, as to what remained due to them for the *Galleries*, the Court ſaid they would give them no Relief, but they muſt take their Remedy againſt ſuch particular Pariſhioners as had employed them, or elſe in the Spiritual Court. Yet a Precedent was cited between *Birch* and *Barſton*, *&* *al'*, Church-wardens of *Lambeth* Pariſh. *Trin.* 2 *William* and *Mary*, in this Court, where the Court decreed the Plaintiff, who was late Church-warden there, to be paid the Money he had laid out for the Uſe of the Pariſh, with Coſts, and then the Decree goes on and ſays, for which Purpoſe the Veſtry of the ſaid Pariſh are to take Notice hereof (*viz.* of the Decree) and ſet a Rate accordingly; and what the Church-wardens ſhall pay in Obedience to this Decree, the ſame is to be brought into their Accounts, and to be allowed them when they paſs their Accounts with the Pariſh.

Note; There are the like Words in a former Decree of *February*, 36 *Car.* 2. *James* and *Rich* *&* *al'*, which Decree is recited in the Decree of 2 *W.* and *M.* and was read at the hearing of the Caſe.

James

Caſe 43.

James verſus *Hailes.*

An Eſtate in Mortgage is ſettled on *A.* for Life; Remainder to *B.* Fee Tenant for Life ſhall bear two Fifths of the Principal and Intereſt, and the Remainder Man three Fifths.

IF an Eſtate in Mortgage be ſettled on *A.* for Life, and then on *B.* in Tail, or in Fee; Tenant for Life ſhall bear two Fifths of the Principal and Intereſt, and the remainder Man three Fifths.

Caſe 44.

Herbert verſus *Herbert.*

A Feme Covert who has Pin-Money, or a ſeparate Maintenance ſettled on her, may by Writing, in Nature of Will, diſpoſe of what ſhe ſaves out of it; and ſuch Diſpoſition ſhall bind the Husband.

IN this Caſe there were ſeveral Queſtions concerning a Woman's Pin-Money, or ſeparate Proviſion; but the Court ordered an Account to be taken, and reſerved their Judgment till after the Account taken.

Note; *Hutchins* cited Sir *Paul Neal*'s Caſe, wherein he ſaid it was decreed, that if a Woman has Pin-Money, or a ſeparate Maintenance ſettled on her, and ſhe by Management or good Houſewifry ſaves Money out of it, ſhe may diſpoſe of ſuch Money ſo ſaved by her, or of any Jewels, *&c.* bought with it, by Writing in Nature of a Will, if ſhe die before her Huſband, and ſhall have it her ſelf, if ſhe ſurvive him, and ſuch Money, Jewels, *&c.* ſhall not be liable to the Huſband's Debts.

Caſe 54.

Seymour verſus *Fotherby.*

A Term in Truſt to raiſe any Sum not exceeding the 1500 *l.* for Payment of Debts, he ſhould owe at his Death, and after borrows 1000 *l.* and appoints Truſtees to pay that 1000 *l.* and dies indebted to ſeveral others, yet the 1000 *l.* to take Place according to the Appointment, and not to be divided amongſt all the Creditors.

A Man makes a Settlement of an Eſtate on himſelf in Tail, and if he die without Iſſue, then to Truſtees for a Term for Years, upon Truſt, to raiſe any Sum not exceeding 1500 *l.* for Payment of his proper Debts, which he ſhould owe at his Death. Afterwards he borrows 1000 *l.* of *J. S.* and by Deed appoints his Truſtees to pay that 1000 *l.* out of the Truſt Eſtate, and dies without Iſſue, indebted to ſeveral other Perſons; ſo that the 1500 *l.* would not be ſufficient

to pay all; and the only Question was, Whether the 1000 *l.* thus appointed to be paid, should be paid in the first Place, or in Proportion with the rest of the Creditors.

The Court decreed the 1000 *l.* should be paid in the first Place.

DE
Term. S. Trinitatis,
1692.
In CURIA CANCELLARIÆ.

Graham versus *Stamper*. Case 46.

A Servant bespeaks Things for his Master, and also for himself of the same Tradesman, how far he shall be liable for the Goods of his Master.

A Servant to King *James* 2. relieved against a Judgment at Law for Lace, &c. delivered for the King's Use, just before his Abdication, on the Circumstances of the Case, whereby it appeared the Defendant never took the Plaintiff in his own Person to be liable, but had always been paid out of the Privy Purse.

THE Plaintiff *Graham* was Privy Purse to King *James* the Second, and also Master of his *Buck Hounds*; the Defendant was a *Laceman*, and by his Friends made Interest to the Plaintiff, that he may be made Use of to furnish Lace, &c. for the King's Hunt, &c. and was employed accordingly: And *Graham* did likewise deal with him on his own private Account; and he was from Time to Time paid for what he furnished for the King's Liveries out of the Privy Purse; but on King *James*'s going away, the Defendant brought *Indebitat. Assump.*

against *Graham*, as well for what he had furnish'd for the King's Use, as for what he had furnished for *Graham*'s own particular Use, and recovered for both.

This Bill was brought, to be relieved against that Judgment: The Court went on these Circumstances in the Case, that *Stamper* had been permitted to furnish Lace and Fringes, &c. for the King, on his own Desire and Application made to *Graham* on his Behalf; that the Entries in the Day-Books of such Goods as were delivered for the King's Use, were without Price; that they may be added in the Leidger-Book higher or lower, as they had a Prospect of sooner or later Payment; that the Defendant had from Time to Time been paid out of the Privy Purse, and one Witness had sworn that the Defendant had said that he expected Payment from the Privy Purse, and not elsewhere.

That the Account of the Goods delivered to the King's Use, had been paid off to about ten Months; but the Account delivered on *Graham*'s private Score was of four Years Continuance, which shews *Stamper* kept them as distinct Accounts.

That none of the Goods delivered for the King's Use came to *Graham*, nor was there any particular Promise of his to pay for any of them; and therefore, if the Law should be, that he who speaks for or fetches Goods for his Master, without any particular Promise of paying for them, is liable to pay for them (which they seemed to doubt) yet on the particular Circumstances of this Case, it would be fit to consider how far Use should be made of this Judgment.

As to the Objection, that the Damages at Law being intire, could not be severed and apportioned by this Court; the Court answered, that the Defendant had already done that by his Answer, and the Schedule annexed to it, having therein set forth how much *Graham*'s own proper Debt was, and how much for Goods delivered for the King; and in doubtful Cases it is most prudent

dent to try their Fortunes at Law, before they come into this Court, and that therefore the Proceedings that have been at Law ought not to be objected; for if this Court cannot relieve after Judgment at Law, it cannot correct the Rigour of the Law at all, for till Judgment it may be very doubtful what the Law is.

Trevor said, it was a Case of great Consequence, but of very little Doubt; but because of the great Noise and Discourse that had been made about it, they ordered a Master to state it on the Books, Answers, Proofs and Pleadings; and then the Court would direct for how much Execution should be taken out.

kinson versus *Molineux.*

Case 57.

By an Extent in Aid, taken out by a simple Contract, Creditor against himself, and the Debt found, he preferred himself to Bond-Creditors who had recovered Judgment against the Executor, the Executor not relievable in Equity. *Sed Quære.*

T ...ntiff's Testatrix was indebted to several Persons by several Bonds, &c. and to the Defendant by simple Contract; and Judgment is recovered against the Plaintiff upon one of the Bonds, the Defendant being one of the King's Receivers, and bound with Sureties to the King, to answer what he should receive; takes out an Extent in Aid against himself, and has this simple Contract Debt found, and takes out a *Scire Facias* against the Plaintiff, and has Judgment thereupon in the Exchequer.

Whereupon the Plaintiff brought his Bill here to be relieved, suggesting that these Proceedings were fraudulent, and on purpose to interrupt the legal Course of Administration, and to defraud the rest of the Creditors (for there were no further Assets) that had Debts of a higher Nature, and to make him pay what had been recovered by them against him out of his own Pocket; that this Extent was not prosecuted by the King, but by the Defendant himself, and at his Charges; and that he

was

was not really indebted to the King at the Time of the Extent (tho' the Bond were kept on Foot) or that if he were, he or his Sureties were able to pay the King's Debt, and ſo that not in Danger.

The Defendant pleaded theſe Proceedings in the Exchequer in barr to the Plaintiff's Relief, but by his Anſwer confeſſeth that he had proſecuted the Extent at his own Charges, and that he was able to pay the King at the Time of the Extent.

The Court allowed the Plea, and would not relieve the Plaintiff; and yet not long before they had relieved Alderman *Sturt* in Caſe of ſuch an Extent. *Qu.* Wherein this Caſe differs from that, further than that there the Creditors were Plaintiffs, here the Executor.

DE
Termino S. Mich.
1692.
In Curia Cancellariæ.

Gibbs versus *Herring*.

Case 48.

A. In his Life-time intrusts *J. S.* with several Moneys of his to dispose of at Interest; then *A.* dies, Part of the Money remaining in the Hands of *J. S.* undisposed of: The Executrix of *A.* desires *J. S.* to put it out at Interest, who does so, and the Security proves defective.

An Executrix having Money in the Hands of *J. S.* to a Share whereof she was intitled in her own Right, intrusts *J. S.* to put it out at Interest for her, which he does, and the Security proves defective, she shall not answer the Loss to the other Legatees or Sharers.

The Executrix shall not make it good to the Plaintiffs, who were to have a Share of the Estate, by the Custom of the Province of *York*, but against a Creditor she should. So it is of Goods sold *bonâ fide* to a Person who became insolvent before all the Money paid.

Note; She herself was intitled to a Share of the Estate as well as the Plaintiffs.

Case 49.

Walker versus *Penrin*.

Mortgagee having received 8 *per Cent.* decreed to account for the 2 *per Cent.* over Value to sink the Principal; but if Principal and Interest had been overpaid at that Rate no refunding.

IN this Case it was decreed, that a Mortgagee having received 8 *l. per Cent.* since the Year 1660, should account for the 2 *l. per Cent.* over Value, to sink the Principal Mortgage Money; but if the Principal and Interest were over paid, the Parties must shake Hands, for there shall be no refunding.

Case 50.

Strode versus *Gibbs*.

Freeman of *London* gives Bond to his Mother, to be paid after his Death, this shall go out of the whole Estate, and not out of his customary Part only.

IF a Freeman of *London* gives Bond to his Mother to be paid after his Death, this shall go out of the whole Estate, and not out of his own customary Part only.

Case 51.

Hale versus *Hale*.

A. conveys a Term for Years in Trust, to raise 1500 *l.* for such Child or Children as should be living at his Death. A Posthumous Child held a Child living at his Death, to take within the Meaning of that Trust, which was not to be construed so strictly as a Limitation at Law.

A. Conveys a Term for Years to *J. S.* upon Trust, to raise 1500 *l.* for such Child or Children of *A.* as should be living at the Time of his Death; *A.* dies, leaving no Child, his Wife *ensient* with a Daughter, which was afterwards born.

My Lord Keeper declared that this Posthumous Daughter is a Child living, at the Death of *A.* within the Mean of the Trust, and that a Direction of a Trust is not to be so strictly construed, as a Limitation of an Estate at Law. And one *Lutterel*'s Case was cited in my Lord *Bridgman*'s Time, where a Bill was exhibited on Behalf of an Infant in *Ventre sa mere* to stay Waste, and an Injunction granted upon it.

DE Termino Paschæ, 1695.

In Curia Cancellariæ.

Harrison versus *Forth*.

Case 51.

A. sells to B. who has Notice of an Incumbrance on the Estate; B. sells to C. who has no Notice, and he to D. who has Notice, whether this revives the first Notice to B.

THE Master of the *Rolls* was of Opinion in this Case, that if *A.* purchases an Estate, with Notice of an Incmbrance, or that it is redeemable, and then sells it to *B.* who has no Notice; who afterwards sells it to *C.* who has Notice; that by this, the first Notice to *A.* the first Purchasor, is thereby revived, and that *C.* the last Purchaser shall be liable to the Incumbrance or Redemption, as if it had never been in the Hands of one who had no Notice.

Afterwards, on Appeal to my Lord *Keeper*, it being urged, that in such Case an innocent Purchaser without Notice may be forced to keep his Estate, and cannot sell it, and shall be accountable for all the Profits received *ab initio*, his Lordship held, that tho' *A.* and *C.* had Notice, yet if *B.* had no Notice, the Plaintiff could not be relieved against the Defendant *C.* and ordered *C.* to be examined on Interrogatories, if he ever saw the Conveyance from the Plaintiff to her Sisters, and then to be tried if the Defendant *C.* paid any, and what Consideration for the said Lands; and if *B.* had Notice at the

Time

Time of his Purchase that it was redeemable; for if he had not, the Plaintiff could not be relieved, though *A.* and *C.* had Notice.

Case 52.
2 Vern. 319. S. C.
A. indebted to *B.* 300*l.* in Consideration of a Settlement on him by *A.* after his Death, gives Bond to *C.* in Trust for *A.* to pay 500*l.* as *A.* should by Will direct. *A.* directs the 500*l.* to be paid to *C.* and makes him Executor on his suing this Bond, and a Bill brought by *B.* This 500*l.* held Assets in *B.*'s Hands to pay what was due to him.

Thompson versus *Towne.*

WILLIAM THOMPSON, seised of the Manor of *Boothby*, in *Com. Lincoln*, of about 200*l. per Ann.* (which was charged with a Rent-Charge of 120*l. per Ann.* for Life) and being old and not married in *November* 1687, settled the said Manor on himself for Life, and after on the Plaintiff *Anthony Thompson* (who was his near Kinsman) and his Heirs: And the Plaintiff as the Consideration of the said Settlement, did at the same Time give a Bond to the Defendant, by *William Thompson*'s Direction, and in Trust for him, of 1000*l.* Penalty, conditioned to pay any Sum or Sums of Money not exceeding 500*l.* to such Person or Persons, and in such Manner as the said *William Thompson* should by his last Will devise and appoint.

William Thompson was at the Time of making this Settlement, and giving this Bond, indebted to the Plaintiff in 300*l.* by Bond, and did afterwards become indebted to him in several other Sums of Money, to 70*l.* and upwards.

In the Year 1689, *William Thompson* makes his Will, and reciting the said Bond to the Defendant in Trust for him, devises the 500*l.* secured thereby to the said Defendant the Obligee, and makes him Executor, and directs him to pay 50*l.* to one *William Disney* to bind him an Apprentice, and 50*l.* more to set him up, and 20*l. per Ann.* to one *Anne Perkins* for Life, and in 1692 dies.

Defendant puts the said Bond in Suit against the Plaintiff, who brought this Bill to subject this Money to be Assets in his Hands to pay the 300*l.* and 70*l.* due to him from the Testator.

The

The Defendant by Anſwer inſiſted, that the Conſideration of *William Thompſon*'s making the ſaid Settlement was, that he might have 500 *l.* to diſpoſe of, and that he would not elſe have made the Settlement, and therefore the ſaid 500 *l.* ought not to be Aſſets, eſpecially to anſwer the Plaintiff's Debts; and at the hearing of the Cauſe the Defendant pretended he had proved that the Plaintiff and *William Thompſon* had agreed at making the ſaid Settlement, that the Plaintiff's Bond ſhould be delivered up; but theſe Depoſitions were oppoſed, and could not be read, becauſe that Matter was not put in Iſſue by the Defendant's Anſwer, and the Proofs did amount to no more than that *William Thompſon* himſelf had ſaid, that he intended that Bond ſhould be delivered up.

My Lord Keeper directed it to be tried at Law, whether it were agreed that the ſaid Bond of 300 *l.* ſhould be delivered up or ſunk; and that Iſſue was tried for the Plaintiff, *viz.* that it was not agreed, *&c.*

The Cauſe coming after to be heard on the Equity reſerved, the Keeper decreed the ſaid 500 *l.* to be Aſſets to pay the Plaintiff's Debt, and that it ſhould go to a Maſter to compute what due to him, and he to retain ſo much as to ſatisfy himſelf, and to pay the Overplus to the Defendant. And on Appeal to the Houſe of Lords, this Decree was affirmed.

DE

Term. S. Trinitatis,

1695.

In Curia Cancellariæ.

Case 53.

Walsh versus *Walsh*.

A. has three Brothers, one dies, leaving two Children, another three, and the third five; then *A.* dies intestate, the Distribution shall be *per Capita*, and not *per Stirpes*, being all next of Kin in equal Degree.

A. has three Brothers, one dies, leaving three Children, another two, and the third five, then *A.* dies intestate; and *per Lord Keeper*, on Time taken to consider of this Case, Distribution shall be *per Capita* and not *per Stirpes*; and that all the Children should have equal, because none take by way of Representation, but all as next of Kin in equal Degree.

Case 54.

Starling & al', versus *Ettrick* & al'.

Where a Person may take by the Name of Heir, tho' not Heir General.

SIR *Samuel Starling*, 4 *January* 1672, conveyed the Manor of *S.* &c. to two Trustees and their Heirs, upon Trust and Confidence that they and their Heirs should convey the Premisses, and every or any Part thereof to such Person, and for such Time, Term and Estate as he the said Sir *Samuel* by any Writing under his Hand and Seal, in the Presence of two or more credible Witnesses,

Witnesses, or by his last Will and Testament in Writing, should direct, limit or appoint; and for want of such Appointment to the right Heirs of the said Sir *Samuel* for ever; and after, by Will dated in *August* 1673, Sir *Samuel* devises several Messuages to charitable Uses, and devises to the Plaintiff *Samuel Starling* the elder, his Nephew, some Houses in St. *Sepulchre*'s, but he was only to have 50 *l. per Annum* out of them till his Age of 24, and 100 *l.* to bind him an Apprentice; and if the Plaintiff *Samuel* the elder should die before his Age of 24, that then the Trustees should convey the said Houses to the right Heirs Male of Sir *Samuel*; and for Default of such Heirs Male to the right Heirs of Sir *Samuel* for ever; and did appoint that the said Trustees and their Heirs should within six Months after *Lady-day* 1695, convey the Manor of *D. &c.* to his Nephew *Richard Starling* (who was his Heir at Law) if he should be then living, for Term of his Life only; or, if he should be dead, for his Heirs Male, to hold to him and his Heirs Male for ever; and for Want of such Issue to his own right Heirs for ever.

Soon after, Sir *Samuel* died, leaving his Nephew *Richard* his Heir; *Richard* had Issue *Jane* (married to the Defendant *Ettrick*) and died; and it was said in the Bill, that Sir *Samuel* had great Displeasure against his Nephew *Richard*, by Reason of his Extravagancy and bad Courses, and therefore had left him no Estate till he should be 40 Years old, and then only for Life; and had often declared, that he would settle his Estate so, that if *Richard* died, his Nephew *Samuel Starling* should have it; and after this Settlement and Will, had told several Persons, that he had so settled it, and the Plaintiffs (who were *Samuel Starling* the Elder, and *Samuel* his Son) insisted, that either *Samuel* the Elder is intitled as right Heir Male of Sir *Samuel*, or else *Samuel* the Younger, as Heir Male of *Samuel* the Elder.

To

To this Bill the Defendants demurred, for that it appeared of the Plaintiff's own ſhewing in their Bill, that they had no Title.

On arguing the Demurrer, it was over-ruled, and Defendants ordered to Anſwer; but the Plaintiffs were not to examine to any Parol Diſcourſes of Sir *Samuel Starling*, how he intended to ſettle, or had ſettled his Eſtate, without ſpecial Leave of the Court.

Afterwards the Plaintiffs moved the Court, that they might have Leave to examine to ſuch Diſcourſes and Declarations of Sir *Samuel*, and inſiſted, that ſuch Examination had been in the Caſe of the Counteſs of *Gainſborough*, and Earl of *Gainsborough*, and of *Crompton* and *North*, and ſeveral other Caſes; and the Parties had been relieved upon ſuch Examinations for the expounding and explaining Wills; and if the Plaintiff could mend his Caſe by ſuch Examination, then to prevent him of them, would be to debarr him of his Right; but on the other Side, if upon the Hearing, the Examination ſhould appear impertinent, the Court could recompence the Defendant in Coſts.

For the Defendant, it was inſiſted, that it would be of fatal Conſequence to admit Examinations of this Kind, to carry Eſtates, contrary to the Words of a Will, and what by Law they do import, and my Lord Keeper inclined that Way, and denied to admit the Plaintiffs to examine to thoſe Matters.

Afterward the Caſe was argued at *Powis Houſe*, and the Subſtance of what was inſiſted upon by the Plaintiff's Council, was, that this being in the Caſe of Truſt, and a Will ought to have the moſt favourable Conſtruction the Court can give it; and it is very plain, what Sir *Samuel* intended, *viz.* that his Eſtate ſhould be continued in the Name, and go the Males of the Family; and this is not a Limitation of an Eſtate, but a Direction to the Truſtees to make a Conveyance; that the Word *Heir* is in many Caſes, even in Legal Writs, *&c.* taken for Heir

 Apparent,

Apparent, as the Father may have a Writ, *Quare Fil' & Hæred. cepit*, &c. which muſt be his Heir Apparent; and in the Caſe of *Burchet* verſus *Durdant*, where Lands were deviſed to the Heirs of *J. S.* now living; it was held, that the eldeſt Son of *J. S.* ſhould take, tho' in ſtrictneſs of Speech, he was not Heir during the Life of his Father, but Heir Apparent only.

On the other Side, it was argued, that if this had been a Deviſe of the legal Eſtate itſelf, it is plain, that neither of the Plaintiffs could have taken any Thing by it; for it is a known Rule in Law, that whoever will take as a Purchaſer by the Name of Heir-Male, muſt be in the ſtricteſt Senſe Heir as well as Male, or elſe he cannot take at all; and in the Caſe of *Burchet* and *Durdant* the Words *now Living* altered the Caſe, and made it a Deſcription of the Perſon, and without theſe Words, the Heir Apparent could not have taken, and it would introduce great Inconveniencies, if legal Inheritances, and equitable Inheritances ſhould not be governed by the ſame Rule; and the Conveyance being to be made within ſix Months after *Lady-Day* 1685; if he is not a Perſon capable to take at that Time, he can never take at all, and the Will cannot, by any Proofs, have any Senſe and Meaning put upon it, other or different from what it would have had without theſe Proofs, for all the Will muſt be in Writing.

My Lord *Keeper* diſmiſs'd the Bill, and decreed the Truſtees to convey to the Defendants, according to the Will of Sir *Samuel Starling*, they having a Croſs Bill for that Purpoſe.

Case 55.

In Court before the Master of the Rolls.

If Plaintiff replies to Defendant's Plea, he thereby admits the Plea to be good, if it be true, and the Validity of the Plea can never after be considered, but only the Truth of it, as he proves it, or the Plaintiff disproves it.

Parker versus *Blythmore.*

THE Plaintiff had a legal Title, but the Deed by which he claimed was loſt, and he brought this Bill to ſet it up, the Defendant anſwered as to part, and pleaded himſelf a Purchaſer for a valuable Conſideration, without Notice, *&c.* The Plaintiff replies to the Plea, and the Defendant proves his Plea, and the Plaintiff proved no Notice upon him; and when the Cauſe came to be heard, the *Maſter* of the *Rolls* was of Opinion, that the Plea was good; but the Queſtion was, Whether the Court could now conſider of that at all, the Plaintiff having admitted the Plea to be good, by replying to it, and nothing being now in Queſtion, but whether it be true or not; and if it ſhould not be ſo, no Plaintiff would ever ſet down any Plea to be argued, but would reply, and put the Defendant to the Charge of Examining, and then conteſt the Validity of the Plea at the Hearing; and beſides, the Defendant would be prevented from making ſuch other Defence as he might, by relying in his Plea.

DE

DE
Termino S. Mich.
1695.
In Curia Cancellariæ.

Attorney-General, at the Relation of the Inhabitants of *Stains*, versus *Taylor*.

Case 56.

Exemplification of part of a Patent not suffered to be read in Evidence, notwithstanding the Statutes of 3 and 4 of *Edward* 6 and 13 *Eliz.* where the other Side have no Time to consult the Patent-Roll, and so may be surprized by an imperfect Exemplification.

IN this Case the Plaintiff would have read in Evidence an Exemplification of part of a Patent, which was objected to by the Defendant, for that nothing but the Patent itself, or an Exemplification or Copy of the whole could by Law be Evidence. Plaintiff's Council insisted, that by the 3d and 4th of *Edward* 6. *Cap.* 4. and 13 *Eliz.* *Cap.* 6. an Exemplification of so much of a Patent as relates to the Matter in Question, is to all Purposes of Law made of the same Force, as if the whole Patent were exemplified, whereupon the Statutes were ordered to be read.

My Lord *Keeper* was clearly of Opinion, that tho' by those Statutes an Exemplification of part of a Patent be made sufficient to make a Title under, or to be pleaded in any Court where the other Side will have Time to resort to the Patent, and to be advised, whether the Exemplification be of all that is material; and if it

be not, they may take Advantage of it; yet they did not extend to authorize the giving ſuch Exemplifications in Evidence, where the other Side could have no Time to conſult the Patent Roll, and might be ſurprized and loſe his Right by an imperfect Exemplification; and cited a Caſe, wherein he had known it ſo held in *B. R.* on offering ſuch an Exemplification in Evidence; and therefore, if the Plaintiffs inſiſted upon it being of great Conſequence, he would have the Opinion of all the Judges, before he would admit of it; whereupon the Plaintiffs waved it, and produced the Patent Roll itſelf, and ſo the Cauſe went on.

DE
Term. S. Trinitatis,
1696.
In CURIA CANCELLARIÆ.

Meynell versus *Howard*. Case 56.

A Man makes a Mortgage redeemable upon Payment of Money, but there is no Covenant for Payment of the Money in the Deed; then the Mortgagor makes his Will, and devises his Personal Estate amongst his Relations; and the Question was, Whether the Money on this Mortgage be such a Debt, as that the Personal Estate shall be applied towards the Discharge of it? It was said, that Sir *Edward Moor* had made such a Mortgage, and afterwards raised a Term in other Lands for Payment of his Debts; and the Mortgage Money was held to be a Debt payable out of that Trust.

Heir of the Mortgagor shall have the Personal Estate applied, in the first Place, to pay off the Mortgage Money, tho' no Covenant in the Mortgage Deed for Payment of it, tho' the Personal Estate is devised away by the Mortgagor to his Relations, because 'tis a Debt.

Cur. So it is here, and the Personal Estate must discharge it.

DE

Termino S. Mich.

1696.

In Curia Cancellariæ.

Case 57.

Ballet versus *Sprainger*.

A Devisee for Life of Mortgaged Lands, must pay his Portion of the Mortgage Money.

A Man makes a Mortgage, and then devises the Land to *A.* for Life, and the Reversion descends to his Heir; the Tenant for Life enters into Possession, and brings a Bill against the Mortgagee to redeem, and the Heir likewise brought his Bill to redeem; Tenant for Life did not prosecute his Bill, but continued to receive the Profits, and about a Year before his Death, purchases in the Mortgages in the Name of the Defendant, and made the Defendant Executor, and died.

The Heir brought this Bill to redeem, and the only Question was, Whether the Devisee for Life should go away with all the Profits received, and the Heir be forced to pay off all the Incumbrances; or whether any Part of the Profits received should be applied to sink the Mortgage Money.

Lord *Keeper.* Devisee for Life must pay one Third of what was due at the Death of the Devisor, with Interest for the same, and the Heir must pay the rest, and the Master must take the Account accordingly; and so it would have been, if the Mortgagee had received the Profits, during the Life of Tenant for Life, and a

 Case

Case between *Clyatt* and *Battson*, *Trin.* 1686. was cited to that Purpose.

Cleland versus *Cleland*.

Case 58.

PLaintiff's Grandfather was Tenant for Life of a Farm, and the Inheritance was in the Plaintiff's Father, to whom he is Heir, on the Marriage of the Plaintiff's Father with the Defendant, who had a Portion of 300 *l.* in her Brother's Hands, and secured by his Bond to her; the Father and Grandfather join in settling this Farm upon the Defendant for her Jointure; and this Settlement is expressed to be made in Consideration of 100 *l.* paid to the Grandfather for the Marriage Portion of the Defendant, which 100 *l.* was paid to him accordingly by her Brother.

The Wife's Portion, tho' out on Bond or Mortgage, which by Law Survives to her, shall yet in Equity be Subject to the Husband's Bond-Debts to ease the Heir, where a Settlement is made on the Wife, for that makes the Husband a Purchaser of her Fortune, and it shall go to his Executors; but if the Settlement were only in Consideration of Part of the Fortune, then the remaining Part out on Bond shall Survive to the Wife, unless there were an express Agreement that the Husband should have it.

The Marriage took Effect, and the Defendant's Husband died indebted to several Bonds, wherein he and his Heirs were bound, and Actions were brought against the Plaintiff, as his Heir, on the said Bonds, to subject the Real Estate descended to the Payment of them; and he brought this Bill to have the remaining 200 *l.* of the Portion, which was unpaid, applied in Discharge of these Debts.

It was pretended by the Defendant, that there was but 100 *l.* of her Portion to be paid, and that it was agreed by her Husband and herself before the Marriage, that the remaining 200 *l.* should be hers; and besides, that her Husband being dead, and this being a Debt to her not disposed of by him, it did by Law belong to her.

It was pretended by the Plaintiff to be expresly agreed before the Marriage, that the remaining 200 *l.* of her Portion should be applied to pay the Husband's Debts, if there was Occasion, but neither of the Agreements were well proved.

The

The Master of the *Rolls* decreed the 200 *l.* to be applied towards Payment of the Husband's Debts, and said it was natural Equity it should be so, and there being a Settlement made on the Wife, the Portion, tho' it remains a Debt to the Wife doth belong to the Husband.

An Appeal was afterwards brought from this Decree before the Lord *Chancellor*, and he was of Opinion, that as this Case is, unless there were an Agreement, that the Husband should have the other 200 *l.* it will Survive to the Wife, and therefore directed it to be tried, whether there were any such Agreement or no; but if the Settlement had been in Consideration of the whole Portion, and had been Equivalent to it, that would have amounted to an Agreement, that the Husband should have had it.

Note, There was an Objection made in this Case for want of Parties; for that the Administrator of the Husband was not made a Party, but the Wife being called Administratrix in the Bill, and having by her Answer confessed, that she had Possessed the Personal Estate, and dispossed of it (and being the Person by Law intitled to Administration) tho' she denied, by Answer, that she had taken Administration, the Court over-ruled the Objection.

Case 59.

Bloxton versus *Drewit.*

One having Order to prove a Deed *viva voce*, at the Hearing not allowed to prove the Witnesses Hands, they being dead, but had leave to examine in the Office, to prove the Deed, tho' Publication was passed.

THE Plaintiff had an Order to prove a Deed *viva voce*; at the Hearing it happened, that all the Witnesses to the Deed were dead, and the Plaintiff produced a Witness at the Hearing to prove their Hands, and this he could not be admitted to do; but the Master of the *Rolls* put off the Cause, and gave Liberty to examine in the Office to prove the Deed, notwithstanding Publication past.

Lady *Radnor* versus *Rotheram.*

Case 60. Parl. Cases 196. S. C. 13 *November.*

A Dowress shall not have the Assistance of a Court of Equity to set aside a Term for Years against a Purchasor. *Secus* of a Jointress, but against an Heir at Law a Dowress has been let in.

THIS Case had been argued by Council on both Sides, and this Day was appointed to give Judgment.

The Case was, Lady *Radnor*'s Husband was seised in Tail of the Lands in Question, but there was a Term for 99 Years Prior to his Estate (which was created for the Performance of several Trusts in the Earl of *Warwick*'s Will, which were all performed, and after to attend the Inheritance) he levied a Fine, and suffered a Recovery, and sold the Estate to the Defendant; but his Wife not joining, she, after his Death, recovered Dower, and brought this Bill to have the Benefit of the Term.

It was said, the Husband should have had the Benefit of this Term, and Dower is the Continuance of the Husband's Estate, and the Vendee of the Husband shall have it, as to the Inheritance, and therefore, so ought the Dowress too; and if she had been a Jointress, there is no Doubt but she should have had it, and the Purchaser had Notice of the Marriage; and several Cases were cited, *Rockby* versus *Burdett*, Attorney General, and *Farmer Cloud*, and *Drake*, *Fletcher*, and *Robinson*, &c.

My Lord *Chancellor* said, he could not help the Plaintiff; for tho' a Jointress shall have the Aid of a Court of Equity in the like Case, that is, because she has a fixed Interest by the Agreement of the Party; but a Dowress has an Interest by Law, under particular Circumstances; and if it went upon the true Reason of the Thing, a Woman should be as well endowed of a Trust of an Inheritance, as of the Inheritance itself, which yet all agree she shall not be; and where an Inheritance, upon which a Term is attendant, is recovered, there the Term shall go along with it, for it must either do so, or be extinct, for the Trustee cannot have it. This Case has frequently happened, and yet was never helped,

which is a ſtrong Argument, it cannot be. In the Caſe of *Snell* verſus *Clay* the Term did go to the Tenant by the Curteſy, but this Point was not ſtirred there; however, that was againſt an Heir at Law, and that is another Caſe; but here is a Purchaſer, if there had been any Agreement to have had the Benefit of it, as there was in the Caſe of *Barker* and *Fouke*, it would have done it; but in this Caſe I can't aſſiſt the Dowreſs againſt a Purchaſer, nor perhaps could I againſt the Heir.

The Lady *Radnor* brought an Appeal, and the 14th of *April* 1697, the Decree was affirmed in the Houſe of Peers.

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Termino S. Hillarii.

1696.

In Curia Cancellariæ

Fairfax verſus *Heron*. Caſe 61.

One deviſes all his Lands after the Death of his Executor, to *A.* and his Heirs for ever; but if he die, leaving no Son, then to *B.* This is a good Executory Deviſe to *B.* if *A.* dies without Iſſue, becauſe the Contingency muſt happen within the Compaſs of a Life.

THIS Caſe was ordered to be ſtated by a Maſter, and was thus; *William Barker*, Eſquire, being ſeiſed in Fee of divers Freehold Lands of 400 *l. per Ann.* the ninth of *November* 1684, makes his Will in Writing, duly atteſted by four Witneſſes, and made his Nephew *Henry Fairfax* (his Heir at Law) Executor and Reſiduary Legatee, and thereby deviſed in theſe Words; *I give all my Freehold and Copyhold Lands which I have in Poſſeſſion, Remainder and Reverſion, (not hereafter diſpoſed of) after the Death of my Executor, to* William Fairfax *his Son, and his Heirs for ever; but if he die leaving no Son, then to that Son or Sons my Executor ſhall think fit to give them to by his laſt Will; which Son or Sons ſo nominated (if* William *die as aforeſaid) I declare ſhall have my Lands, charged notwithſtanding with ſuch Annuities, Legacies, and Payments, as hereafter ſpecified; and for Want of a Son of my Executor, I give the ſaid Lands to the eldeſt Son of my Neice* Heron, *my Executor's Siſter, charged notwithſtanding as aforeſaid; and I give my Leaſes to my Kinſmen* Paul Jodrel, *and* Thomas Barker, *in Truſt*

Trust for the Benefit of my Executor for Life; and after his Death in Trust for all my Executor's Children; and for want of any Child or Children, in Trust for the eldest Son of my Neice Heron; *and that the Leases may be renewed if any or more of the Lives die, or my Trustees think fit to change any of them, I do desire they would do it on reasonable Terms.* And if his Executor did not provide Money enough for that Purpose within a Month after Demand, that the Trustees might mortgage any of the Lands of Inheritance to renew the Leases (except those belonging to the *Alms-House*) and appointed his Executor to pay his Wife out of any Part of the Estate (except the *Alms-House Lands*, and a Farm near *Wokingham*, in the Possession of *George Goswell*) 200 *l. per Ann.* for Life, half-yearly, without any Deduction whatsoever, and several other Legacies, and made his Nephew *Henry Fairfax* sole Executor and Residuary Legatee.

William Fairfax the Executor's Son died an Infant without Issue, in the Life of *William Barker*, and *William Barker* died without Issue; and *Henry Fairfax* proved his Will, and possessed Personal Estate sufficient to pay all the Debts and Legacies, and paid them accordingly, and died, leaving Plaintiffs his Daughters, and Coheirs. Mrs. *Heron* the Neice had two Sons, *Thomas* the eldest (now Defendant) and *Horatio*, who were living at Mr. *Barker*'s Death; and the Question was, Whether *Thomas Heron* took any, and what Estate by it?

If Lands are devised to one generally, he takes but an Estate for Life, unless it appear plainly the Testator intended him a greater, or that he is like to be a Loser, or his Person chargeable.

My Lord Keeper was of Opinion, that he took an Estate for Life only, and no more; for if Lands be given to a Man generally without limiting for what Estate, this makes but an Estate for Life, unless it appears plainly that the Testator intended a greater Estate, which it does not here; and the Money directed to be paid by him cannot enlarge it, for none of them do affect his Person, and so he cannot take but an Estate for Life.

Lord Keeper. I think it is as plain he will take that, for all the Contingencies upon which he is to take, must happen within the Compass of a Life, and so no Danger of

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of a Perpetuity; and this is the ſame with *Pele* and *Brown*'s Caſe in Effect, tho' not in Words, and is like the Caſe of *Brett* and *Rigden*, and the Appointee of *Henry Fairfax* would have taken but an Eſtate for Life.

Wentworth verſus *Deverginy*.

Caſe 6:

A makes a voluntary Settlement on *B.* who after agrees to deliver it up without Conſideration. This Agreement ſhall bind in Equity, for a voluntary Settlement may be ſurrender'd voluntarily.

THE late *Lord Strafford* had entertained the Defendant firſt as his Servant; and afterwards having taken a great Affection to him as his Friend and Companion, and had often promiſed to make him a conſiderable Fortune, did ſettle an Eſtate in *England* on him, of about 150 *l. per Ann.* but my Lord afterwards having a Mind to have that Eſtate back again, the Defendant reconveyed it to him, and delivered back the Deeds; my Lord ſtill continuing his former Kindneſs to him, and his Promiſes of making him a Fortune.

Accordingly my *Lord* did ſettle an Eſtate he had in *Sligo* in *Ireland* (after his own Death) on the Defendant and the Heirs of his Body; and this Eſtate was about 800 *l. per Annum.*

Afterwards my Lord had a Mind to have this Eſtate again, which the Defendant agreed and complied with, my Lord ſtill continuing his Promiſes of making his Fortune, and granted him a Rent-Charge of 600 *l.* out of this *Sligo* Eſtate; but by the Negligence of my Lord or his Agents to demand it, the Defendant never delivered up the Conveyance of the *Sligo* Eſtate, nor made any Conveyance of it.

Afterwards my Lord paid the Defendant 4000 *l.* to purchaſe off a Moiety of this Annuity of 600 *l. per Ann.* and the Defendant thereupon releaſed 300 *l. per Ann.* but afterwards my Lord had a Mind to have that 300 *l. per Ann.* releaſed alſo, and ſpoke to the Defendant about it, who often, both by Word of Mouth, and by Letters, promiſed to releaſe it, and a Releaſe was brought and tender'd to him to be executed; but there having happened ſome Difference between my Lord and him, he

refuſed to execute it; whereof my Lord being inform-ed, he came into his Chamber (for he lived in my Lord's Houſe) and expoſtulated ſharply with him, and there-upon he executed the Releaſe, and my Lord and he parted, and never lived together afterwards, nor ſaw one another except once.

My Lord died, having made his Will, and deviſed all his Real and Perſonal Eſtate (after Debts and Legacies paid) to the Plaintiff, who brought this Bill to have a Reconveyance of the *Sligo* Eſtate, and the Settlement de-livered up.

Defendant inſiſted that he ought not to reconvey, at leaſt not unleſs the 300*l. per Ann.* were made good to him, which he had releaſed by Threats and Compul-ſion, as he pretended; or at beſt, that Releaſe was volun-tary, and without Conſideration, and therefore ought not to be aided in a Court of Equity; beſides, that he was in the Nature of a Purchaſer, being to part with his Intereſt in the Land for the Rent-Charge.

My Lord Keeper ſaid, that a voluntary Settlement might be ſurrender'd without Conſideration, and that ſuch Surrender might be aided by a Court of Equity, and decreed the Conveyance of the *Sligo* Eſtate to be de-livered up, and the Defendant to reconvey it.

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DE Termino Paſchæ, 1697.

In Curia Cancellariæ.

Jory verſus *Cox*.

Caſe 63.

THE Defendant was a Mortgagee, and in Poſſeſſion; the Plaintiff brought a Bill to redeem, and had a Decree accordingly; before the Account taken, the Church became void, and the Mortgagee preſented.

Decree againſt a Mortgagee in Poſſeſſion to redeem; but before the Account taken, a Church becoming void, Mortgagee preſents; yet on Petition ordered to revoke his Preſentation.

Upon the Plaintiff's Petition, the *Chancellor* order'd that he ſhould revoke his Preſentation, and preſent ſuch a Perſon as the Mortgagor or his Vendee (for he had contracted to ſell) ſhould appoint.

Q. How this Revocation is to be; for I think a common Perſon can only *variare preſentando*, but not revoke his Preſentation, tho' the King may.

Cooper verſus *Williams*.

Caſe 64.

A Man deviſes all his Perſonal Eſtate to his Wife for Life, and what ſhe has left at the Time of her Death, it is my Will, and I do deſire her that it may be equally diſtributed betwixt my own Kindred and hers. Teſtator died, and the Widow married the Defendant.

Deviſe of Chattels for Life, with Remainder over, good; but if of ſmall Value, and the Caſe require it, it may be otherwiſe.

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This Bill was brought by the Relations to have an Inventory taken of the Testator's Personal Estate, and that Security might be given that it should not be imbezzled, for that by his Will the Wife had only the Use of the Personal Estate during Life; and the Words, *What she has left* shall be construed to be by Reason of Goods that are *bona peritura*, or may be quite worn out with using.

On the Defendant's Part it was said, that the Estate left was so small, that she could not live upon it without spending the Stock.

Master of the *Rolls*. If that be so, it may alter the Case; therefore let the Master state the Value of the Personal Estate, and then I will give further Directions.

Case 65. Parl. Cases 137. S. C.

Sir *Evan Loyd* and Dame *Mary* his Wife, & al', versus *Carew* & al'.

Limitation of a Fee upon a Fee, on a Contingency to happen within a reasonable Compass of Time, no Perpetuity.

A and *B*. two Sisters, seised of Lands in Fee, for 4000 *l*. paid *A*. by *C*. and in Consideration of a Marriage intended and afterwards had between *B*. and *C*. by Lease and Release, convey all their Lands to the Use of *B*. and *C*. for their Lives, Remainder to their first and other Sons in Tail-Male successively; Remainder to the Daughters of *B*. and *C*. in Tail; Remainder to the right Heirs of *C*. provided that if there be no Issue between *B*. and *C*. living at the Death of the Survivor of them; and that the Heirs of *B*. should within twelve Months after the Death of *B*. and *C*. dying without Issue as aforesaid, pay to the Heirs or Assigns of *C*. 4000 *l*. then the Remainder in Fee so limited to *C*. and his Heirs should cease, and that then the Premisses should remain to the right Heirs of *B*. for ever.

Afterwards *B*. and *C*. for extinguishing the right Title, &c. which *B*. or his Heirs then had, or after might have, by any Settlement, *Proviso*, &c. on Payment of 4000 *l*. or otherwise to the Heirs of *C*. levy a Fine of the

the ſaid Lands to the Uſe of *C.* and his Heirs, and directs the Truſtees of the firſt Settlement to convey accordingly; then *C.* deviſes the ſaid Lands to *D.* his Brother, ſubject to his Debts, which were near 5000 *l.* and after *B.* and *C.* die without Iſſue.

A. the Siſter and Heir of *B.* brings a Bill in Chancery againſt *D.* the Brother and Heir of *C.* and againſt the Truſtees, to have a Conveyance of theſe Lands, on Payment of 4000 *l.* purſuant to the *Proviſo,* but was diſmiſs'd.

An Appeal was brought in Parliament, and for the Defendants or Reſpondents 'twas inſiſted, that the *Proviſo* was void, the Fee being before limited to *C.* and his Heirs, and ſo not capable of a further Limitation, unleſs to happen in the Life of one or more Perſons, in Being, at the Time of the Settlement, which is the furtheſt the Judges have ever gone in allowing contingent Limitations upon a Fee; and if they ſhould be extended to Contingencies to happen within twelve Months after the Death of one or more Perſon or Perſons in Being, they may as well be extended to Contingencies to happen within 1000 Years; and ſo all the Inconveniencies of a Perpetuity will be let in; and the Owner of a Fee-ſimple thus clogged, will be no more capable of providing for the Neceſſities and Accidents of his Family, than a bare Tenant for Life.

2*dly.* If this Limitation were good, then the Eſtate limited to the Heirs of *B.* was vertually in her, and her Heirs muſt claim by Deſcent from her, and not as Purchaſors; and then that Eſtate is barred by the Fine, the Deſign of giving ſuch Power to the Heirs, not being to exclude the Anceſtor; but becauſe the Power in its Nature could not be executed till after the Death of the Anceſtor, being to take Effect upon a Contingency that was not to happen till after that Time, and that by this Means *C.* would not only have no Portion with *B.* but *D.* his Brother would loſe all the Money he paid for the Debts of *C* and which were charged on the ſaid Lands.

U For

For the Appellants it was urged, that the *Proviſo* was not void; that it was within the Reaſon of the contingent Limitations allowed in the *Duke* of *Norfolk*'s Caſe, where it is ſaid, that future Intereſts, ſpringing Truſts, or Truſts executory, and Remainders, that are to ariſe upon Contingencies, are quite out of the Rule and Reaſon of Perpetuities, if they are not of remote Conſideration, but ſuch as will ſpeedily wear out; that tho' there can be no Remainder limited after a Fee-ſimple, yet there may be a contingent Fee-ſimple ariſe out of the firſt Fee; that the *ultimum quod ſit* of a Fee upon a Fee, is not yet plainly determined; that there could not in Reaſon be any Difference between a Contingency to happen during Life or Lives in Being, and within one Year after; and the Reaſon of allowing them to be good, if confined to Lives in Being, or upon their Deceaſe was, becauſe no Inconvenience could follow, and the ſame Rule will hold to a Year after; and that the true Rule to ſet Bounds to them is, when they prove inconvenient, and not otherwiſe; that this Settlement was made with good Advice.

2*dly*. That the Fine could not barr this *Proviſo*, becauſe the ſame never was nor could be in *B.* who levied it.

Mr. *Vernon* added alſo this Reaſon, That if the *Proviſo* had been, that if *B.* die without Iſſue living at the Death of the Survivor of them, then if the Heirs of *B.* do upon the Death of ſuch Survivor without Iſſue, pay 4000*l.* to the Heirs of *C.* then, &c. this you agree had been good, but being extended to a Year after, it is otherwiſe, and may as well be 4000*l.* Years after. To this he ſaid, if the *Proviſo* had been ſo worded, it would have been impoſſible to be performed; for then the Heirs of *B.* who could not be known till her Death, would have been obliged to carry always 4000*l.* about them, ready to pay; and to have the Heirs of *C.* who likewiſe could not be known till after his Death, always ready to receive it upon the Inſtant of the Death of the

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the Survivor ; and it might happen that neither the one who was ready to pay it, nor the other who was ready to receive it, might be Heirs of *B.* and *C.* and surely when the Heirs of neither could be known till their Deaths, twelve Months was but a reasonable Time to procure and pay so great a Sum as 4000 *l.* which shews that a Limitation of a Fee after a Fee upon a Contingency to happen within one or more Life or Lives in Being, or upon their Deaths, being allowed to be good, may be extended further, when, as the Limitation may happen to be, 'twould be inconvenient or impossible to be performed within such a Time ; and that Inconvenience is only to be the Bound to these Limitations, which here is so far from being inconvenient, that it would be inconvenient and impossible to be performed otherwise.

For these Reasons the Decree of Dismission was reversed.

DE

Term. S. Trinitatis,

1697.

In Curia Cancellariæ.

Case 66. *Preston* & ux', versus *Wasey* & ux'.

Feme Covert Heir at Law, and her Husband being drawn in to enter into Articles for supplying the Defect of a Surrender of Copyhold Lands to the Use of a Will, whereby they were devised to the Plaintiff; the Plaintiff not allowed to carry these Articles into Execution, in Respect of the Fraud, and against a Feme Covert Heir at Law.

ONE *Worts* had by Will devised *inter al'* several Lands to his Wife, Part of which were Copyhold, and were surrender'd to the Use of his Will, and others were not surrender'd; the Wife was Executrix, and intermarried with the Plaintiff *Preston*, and they for a small Consideration got the Defendant *Wasey* and his Wife (who was Heir at Law to *Worts* the Testator) to enter into Articles for the conveying of these Lands, and making good the Will of *Worts*; and afterwards on Pretence of some Mistake in the first Articles, they were prevailed on to enter into new Articles to the same Purpose; there was some Consideration for their entring into the Articles, but it appeared they were not well apprised of their Interest when they did; and there was some Art used to bring them to it. And this Bill was brought to have a Specifick Performance.

But the Master of the *Rolls* would not decree the Articles of a Feme Covert for conveying her Inheritance to be specifically performed, but dismiss'd the Bill, and left them to their Remedy at Law, as they should be advised

and on Appeal my Lord *Keeper* affirmed the Decree, but went upon the Fraud, and did not seem to take Notice of its being the Inheritance of a Feme Covert, *&c.*

Serjeant versus *Puntis.*

Case 67.

A Man made a Will of Lands several Years before the Statute of *Frauds* and *Perjuries*, and the Will had but two Witnesses to it; the Testator lived some Time after the Statute, and then died without altering his Will.

Will of Lands made before the Statute of *Frauds* had but two Witnesses, and the Testator died after the Statute, yet the Will being made before held good.

Master of the *Rolls.* I think it is a good Will to pass the Lands, being made before the Statute, tho' the Testator died after; but the other Side insisting to have it try'd at Law, he directed it accordingly.

DE

Termino S. Mich,

1697.

In Curia Cancellariæ.

Cafe 68. **Trotter** verfus **Williams.**

One Devifes to *A.* 500 *l.* to *B.* 500 *l.* and fo to five others the like Sum, and if any to whom I have given any Money, Legacy, happen to die, then his or her Legacy, and alfo the Refidue of my Perfonal Eftate, to go to fuch of them as fhall be then Living: Decreed it fhould be taken to be Living at the Death of the Teftator, and not at any Time after; fo that the Death of any of the Legatees after, would not carry it to the Survivors.

A Man made his Will, and after feveral Legacies devifes in this Manner: *Item,* I give and bequeath to *A.* 500 *l.* to *B.* 500 *l.* and fo gives 500 *l.* a-piece to five others, and my Will is, that if any to whom I have given any Money, Legacy, happen to die, that then her Legacy, and alfo the Refidue of my Perfonal Eftate fhall go to fuch of them as fhall be then Living, equally to be divided betwixt them all.

All the Legatees live to be of full Age, and then one of them makes her Will, and Devifes her 500 *l.* to the Plaintiff, and dies, and the Queftion was, Whether this Devife made by her were good, or whether the Legacy of the deceafed Perfon fhould be divided amongft the Survivors by the Will of the firft Teftator, or fhall go without reftraint of Time.

The *Attorney General* argued, that there was no Ground at all to reftrain the Words, *happen to die,* to a dying, during the Life of the Teftator; and there is no need

of making that Conſtruction for ſaving it from being a lapſed Legacy, for that is as well done by the Deviſe of the Surplus, and there is no Time limited; ſo that his Intention is plain, and muſt be taken to be a Deviſe of the Legacy for Life only, and as to the Surplus, that is not given 'till the laſt Clauſe upon the Contingency.

Rawlinſon ſaid, that if a Time of Payment had been limited, that might have made it have another Conſtruction than now it will, and cited the Caſe of *Clerk* verſus *Bridges.*

Cur. The Words *ſhall go to ſuch of them as ſhall be then living*, muſt refer to a certain Time, and that is, when the Legacies become payable, which is at the Death of the Teſtator.

Joſeph verſus *Mott.*

Caſe 69.

A Decree in Chancery againſt an Executor preferred to a Judgment at Law againſt him, being Prior in Time.

A Man made his Will, and died indebted to ſeveral Perſons by Bond more than his Perſonal Eſtate would pay, a Bond Creditor of the Teſtator's brought a Bill againſt the Executor to have a Diſcovery and Account of the Perſonal Eſtate, and a Satisfaction of his Debt, at the Hearing the Executor made Default; ſo there was a Decree againſt him for an Account and Satisfaction out of the Aſſets *niſi, &c.* before the Decree was made abſolute, another Bond Creditor of the Teſtator brought an Action of Debt at Law againſt the Executor, upon a Bond; he appeared, and becauſe he could not plead this Decree at Law, ſuffered Judgment to go againſt him by Default; and the Account being carried on before the Maſter, the Queſtion before him was, Whether he ſhould allow this Judgment on the Account, and he being in Doubt, reported the Matter ſpecially to the Cort for their Direction.

The Maſter of the *Rolls* was of Opinion, that the Decree muſt be preferred, and it coming now to be reheard before my Lord *Chancellor*, he was of the ſame Opinion.

DE Termino S. Hillarii. 1697.

In Curia Cancellariæ.

Case 70.

Duke of *Norfolk* versus *Browne*.

A Grant of the next Avoidance to one without his Privity held a resulting Trust for the Grantor, no other Trust being declared.

THE late Duke of *Norfolk*, Plaintiff's Father, had executed a Grant of the next Avoidance of a Church to the Defendant's Father, who was a Clergyman, and a Person much intrusted and employ'd by him, and the Grantee knew nothing of the making of this Grant, and being examined in a Cause, deposed that he did not Purchase it of the Duke.

Lord *Keeper*, this is a resulting Trust for the Grantor, there being no other Trust declared.

Case 71.

Smith versus *Loader*.

A. being to procure 1000 *l.* for *B.* borrows it, and pays *B.* only 300 *l.* and takes other 300 *l.* himself, and the remaining 400 *l.* in Goods which prove worth little or nothing, and for securing the whole 1000 *l.* both gave a Recognizance; yet that being sued against *B.* he brought this Bill, and had a Perpetual Injunction against the Recognizance on Payment of 300 *l.* only, and Interest, by Reason of some Circumstances of Fraud in *A.*

PLaintiff being a Man of Estate, and wanting 1000 *l.* applied to the Defendant, who was a Scrivener, to procure it for him; but told him, he would not borrow it of any Mechanick, but of a Gentleman. *Loader* treated with one *Burroughs* a Vintner, who agreed to lend the Money, and the Recognizance was taken

taken, in Name of *J. S.* a Country Gentleman, in Truſt for *Burroughs*; and the Plaintiff did not know that *Burroughs* was the Lender of the Money, and ſome Care had been uſed by *Burroughs*, that he might not know it.

Three hundred Pound of the Money was paid to the Plaintiff upon his entring into a Recognizance, and a Day or two after, 300 *l.* more was paid to the Defendant *Loader*, and the other 400 *l.* *Loader* had taken in Wine (being, as he ſwore in his Anſwer, ſo to do by *Burroughs*) and the Wines were not really worth above 150 *l.*

Execution upon this Recognizance was ſued out againſt the Plaintiff, and he brought this Bill to be relieved, upon Payment of the 300 *l.* only, which he himſelf had received, pretending, that this was only a Contrivance betwixt *Loader* and *Burroughs*.

The Maſter of the *Rolls* took it to be nothing elſe but a Contrivance, and therefore decreed a perpetual Injunction againſt this Recognizance, upon the Plaintiff's Payment of 300 *l.* with Intereſt; and upon Appeal to my Lord *Chancellor*, he affirmed the Decree, tho' no other Evidence than as before.

Bowater verſus *Ellis*.

Caſe 72.

TEnant for Life, and *Ceſtui que Truſt* in Remainder in Tail, joined with the Truſtee in making a Feoffment of the Land, this a good Barr of the Eſtate Tail.

Caſe 73.

Lord *Briſtol* verſus *Hungerford*.

Lands deviſed to be ſold for Payment of his Debts, and that the Surplus ſhould be deemed Part of his Perſonal Eſtate, and go to his Executors, and gives his Executors 100 *l.* a-piece as a Legacy; the Surplus decreed a Truſt in the Executors, and Subject to Diſtribution, for the Direction concerning the Surplus was only to exclude the Heir, not to give it to the Executors in their own Right.

SIR *William Baſſet* made his Will in Writing, and thereby deviſed Lands to be ſold for the Payment of his Debts, and wills, that the Surplus ſhall be deemed

Part of his Perſonal Eſtate, and go to his Executors, and gives to his Executors 100 *l.* a-piece as a Legacy.

The Queſtion was, Whether, as this Caſe is, the Executors ſhould have the Surplus to their own Uſe, or ſhould diſtribute it according to the Statute of Diſtributions?

'Twas urged for the Executors, That by the Will it is expreſſly ſaid, that the Surplus ſhould be Part of his Perſonal Eſtate, and go to his Executors; and therefore it muſt be underſtood, he meant it them, to their own Uſe; and his giving them a Legacy of 100 *l.* a-piece cannot alter the Caſe, for the Surplus might, perhaps, be nothing, and therefore he gave them the 100 *l.* that they might in all Events be ſure of ſomething, and not to exclude them of the Benefit of the Surplus; and this being a Deviſe of the Surplus after Debts and Legacies paid, cannot be a Truſt in them, for then all their Truſt is performed, when Debts and Legacies are paid.

On the other Side, 'twas ſaid, That the Words in the Will, that the Surplus ſhould be Part of his Perſonal Eſtate, *and go to his Executors,* were only intended to exclude the Heir, who elſe would have had it, and not to give any greater Intereſt to his Executors than they would have otherwiſe, *Curia adviſare vult,* but afterwards decreed it to a Truſt in the Executors.

DE
Termino S. Mich.
1698.
In Curia Cancellariæ.

Cowslad versus *Cely*.

Case 74.

Two Executors, and a Bill by a Residuary Legatee against one only, to have an Account of his own Receipts and Payments; yet at the Hearing the Objection for want of the other disallowed, unless in the Process of the Cause it should appear necessary: So where two Factors are, a Bill has been allowed against one, the other being beyond Sea.

THE Plaintiff being a Residuary Legatee, brought his Bill against the Defendant, who was one of the Executors (without his Co-executor) to have an Account of his own Receipts and Payments.

Defendant insisted at the Hearing, that his Co-executor ought to be made a Party; and that, tho' a Bill might be brought against one Factor without his Companion, if he were beyond Sea; yet that had been allowed only for Necessity, and that it was otherwise in Case of Executors.

Lord *Chancellor*. The Cause shall go on, and if upon the Account any Thing appear difficult, the Court will take Care of it: The Reason is the same here, as in Case of Joint Factors; and the running out of Process in this Case, is purely Matter of Form, and I doubt whether a Foreigner can be served with a *Subpœna* in a foreign Country.

Sir

Hutchins ſaid, he remembred that the Great Duke of *Tuſcany* had laid ſeveral Perſons by the Heels, for executing a Commiſſion to examine Witneſſes in his Dominions without his Leave.

Caſe 75.

Balch verſus *Wilſon.*

A Feme Covert has Power given her by her Husband to make a Will: Probate of ſuch Will *per Teſtes*, is ſufficient Proof without other Proof; becauſe, as to that Purpoſe, the Husband has made her a Feme Sole, and no Prohibition will lie.

Caſe 76.

Bold verſus *Corbett.*

Diſcretionary in a Court of Equity, whether it will Aid voluntary Conveyances, when there is no Remedy at Law.

THE Lord *Chancellor* ſaid, in this Caſe voluntary Conveyances might be added in a Court of Equity; but where there is no Remedy at Law, 'tis Diſcretionary in this Court to interpoſe or not.

Caſe 77.

Kirk verſus *Webb.*

A Truſtee purchaſes Lands out of the Profits received out of the Truſt Eſtate, and takes the Conveyance in his own Name; tho' poſſible, if he be unable to make other Satisfaction for the Profits ſo miſapplied, thoſe Lands may be ſequeſter'd; yet they cannot be decreed to be a Truſt for the *Ceſtui que Truſt*, no more than if *A.* borrow Money of *B.* and therewith purchaſes Lands; theſe Purchaſed Lands are no Truſt for *B.* for 'tis not a Truſt in Writing; and reſulting Truſt it cannot be, becauſe that would be to contradict the Deed by Parol Proof, directly againſt the Statute of Frauds; but if the Purchaſe had been recited to have been made with the Profits of the Truſt Eſtate, this appearing in Writing might ground a reſulting Truſt.

THE preſent Queſtion in this Caſe, was occaſioned by a Conſtruction that was made by the Houſe of Peers, upon a Settlement and Will of Sir *Henry Wood*, (which together made but one Conveyance) whereby his Eſtate was ſettled on his Daughter, upon her Marriage then intended, and afterwards ſolemnized between her and the then Earl, now Duke of *Southampton.*

The Eſtate was conveyed to Truſtees (whereof the Biſhop of *Litchfield* and *Coventry*, Sir *Henry*'s Brother was

one) and the Clause that bred the first Dispute was a Limitation, whereby the Trust of the Estate was limited after the Death of the Duke of *Southampton* without Issue, to the *Dutchess* for Life, &c. and after to the *Bishop* for Life, &c. and after to Sir *Cæsar Cranmer* al' *Wood* for Life, &c.

The *Dutchess* died in the Life-time of the Duke, without Issue, and the *Bishop* conceiving himself to be then intitled in his own Right, entered and enjoy'd the Profits for several Years, and till his Death, and made his Will, and the Defendant Executor, and devised several Legacies to Charities, and devised all his Lands to the Defendant.

After the Death of the *Bishop*, Sir *Henry Wood* entered, and the Duke of *Southampton* being then advised, that tho' there were no Limitation of the Trust of the Estate to him, but only that after his Death without Issue by the *Dutchess*, it should go to the Dutchess for Life, &c. yet by the plain Intention of Sir *Henry Wood*, it did belong to him, and being in Case of Trust would be so expounded.

Upon which the Duke of *Southampton* brought a Bill in this Court against Sir *Cæsar Cranmer*, to have a Conveyance of the Estate for his Life, and an Account of the Profits; and the Court were of Opinion with the Duke, that by the Intention of Sir *Henry Wood*, he was to have the Estate for his Life, and decreed accordingly; but Sir *Cæsar Cranmer* brought an Appeal in the House of *Peers*, and the Lords reversed the Decree, for that there was no Estate limited to the Duke of *Southampton*; and it not being limited over till after his Death, the Interest during his Life belonged to the Heirs of Sir *Henry Wood*, as an undisposed Interest.

The two Defendants, who, together with Sir *Cæsar Cranmer*, were Coheirs to Sir *Henry Wood*, brought a Bill to have two Thirds of the Estate, during the Life of the Duke of *Southampton*, and obtained a Decree accordingly.

Upon which, the Plaintiff *Kirk*, as Adminiſtrator to his Wife, who was the only Child of *John Wood*, who was eldeſt Brother of Sir *Henry Wood*, and as ſuch was during her Life intitled to the Profits that had been received by the *Biſhop* out of Sir *Henry*'s Eſtate; and that therefore the *Biſhop*'s Executor ought out of his Perſonal Eſtate to make them good to him; and that the *Biſhop* had out of the Profits of Sir *Henry Wood*'s Eſtate, purchaſed ſeveral Lands, which being purchaſed with his Wife's Money were a Truſt for her, and now for him, as her Adminiſtrator, and ought to be decreed to him, in Caſe he had not a full Satisfaction out of the *Biſhop*'s Perſonal Eſtate.

Upon hearing of the Cauſe, the Perſonal Eſtate was decreed liable to the Plaintiff's Satisfaction, and an Account ordered to be taken of it, and the Maſter to report what Charities, or other Legacies the Defendant, the Executor had paid; and at what Time, and what Purchaſes the *Biſhop* had made in his Life Time, and the particular Times and Values of each Purchaſe, and what of the ſaid Purchaſes had been made with the Profits of Sir *Henry Wood*'s Eſtate, and then the Court would give Directions, as to what Payments ſhould be allowed to the Executor; and how far the Eſtates purchaſed by the *Biſhop* ſhould be liable to make the Plaintiff Satiſfaction.

The Maſter made his Report, certifies the Purchaſes made by the *Biſhop*; and that it appeared to him by Proof (of a Man who received great Part of the Profits of the Truſt, and paid the Money for ſeveral of the Purchaſes) that ſuch particular Parts of the Purchaſe-Money of the ſeveral Purchaſes, were the Profits of the Truſt, *viz.* Sir *Henry Wood*'s Eſtate.

The Matter ſtanding this Day to be heard upon the Maſter's Report, my *Lord* diſallowed the Executor all the Charities and other Legacies (which were very conſiderable) which he paid, tho' they were paid before this Bill brought.

Then the Matter as to the Land was debated, and my Lord ſeemed to be of Opinion for the Plaintiff as to that too, and ſaid, that the *Biſhop* was a Truſtee, tho' he did not take himſelf to be one, and that when a Truſtee laid out the Money of *Ceſti que Truſt* in Lands, he thought the Lands might be followed.

But it being ſtrongly inſiſted upon by the other Side, that they could not, and that it was a Matter of great Conſequence, and never done before, my Lord appointed to conſider of it till a farther Day, and deſired the Aſſiſtance of the Maſter of *Rolls* and Mr. Juſtice *Powell*.

On arguing the Caſe before them, it was inſiſted for the Plaintiff, that 'tis but Juſtice and Reaſon that the Lands Purchaſed with the Profits ſhould go in the ſame Manner as the Profits themſelves would have gone; and tho' it did not appear in the Caſe, that the whole Purchaſes had been made with the Truſt-Money, that was through the Truſtees own Fault, whoſe Part it was to have kept the Account, and it did appear in the Cauſe, that he had received enough of the Truſt Eſtate to make all the Purchaſes, and therefore it ſhall be intended it was all ſo employ'd, unleſs the contrary be proved by the Defendant; and it was compared to the Caſe where a Man mixes his Money with another Man's Heap, he ſhall loſe his own Money; 'twas ſaid, if this Fact had appeared in the Deed, it would have been a Reſulting Truſt, and that this is the ſame Thing, as if a *Guardian* lays out the Money of his *Ward* in Land, and leaves no Perſonal Eſtate, Shall not the Land be liable? And if a Bill had been brought againſt the *Biſhop*, theſe Lands might certainly have been ſequeſtred in his Hands, And ſhall his Deviſee be in a better Condition? And the Caſe of *Piere* and *Harwood*, and ſome other Caſes were cited.

On the other Side, it was ſaid, that it muſt be conſidered how it was before the Statute of *Frauds* and *Perjuries*, and how it would be ſince: Before the Statute it was never held to be a Truſt, unleſs there were a Declaration in the Deed to that Purpoſe, and much leſs can it be

be ſo ſince the Statute; for by the Statute there can be no Truſt, unleſs it be declared in Writing (which is not in this Caſe) and if it be a Reſulting Truſt, it is made ſo by Parol Proof, contrary to the Deed, which is directly contrary to the Statute, and would introduce all the the Miſchiefs That intended to prevent; that it would introduce an utter Uncertainty into all Mens Titles, for the beſt Title may be ſpoiled by proving the Purchaſe-Money to be another Perſon's; and it was ſaid, that this can no more be a Truſt, than if *A.* had borrowed Money of *B.* and laid it out in Land, that Land could be a Truſt for *B.* and the Caſe of *Cox* and *Carr*, and other Caſes were cited.

Juſtice *Powell* ſaid, the Precedents that had been cited on the Plaintiff's Part were nothing to the Purpoſe, ſo that 'tis a Caſe without Precedent, and of great and dangerous Conſequence; he cited the Caſe of *Walter de Chirton*, who was the King's Receiver; and it was found that he purchaſed Land with the King's Money, yet this was never held to be a Reſulting Truſt, not even in the King's Caſe; that it was againſt the Statute of *Frauds* and *Perjuries*, and would let in all the Miſchiefs That intended to prevent; therefore he was of Opinion the Plaintiff could not be relieved.

The Maſter of the *Rolls* was of Opinion, That as this Caſe was, the Plaintiff could not be relieved, and cited the Caſe of *Farrington* verſus *Forth*, and 4 *Inſt. Tit. Court of Chancery*; and the Caſe of *Mears* and *St. John*, 1686; but he ſaid, if it had been expreſly and plainly proved that theſe Purchaſes had been made with the Profits of the Truſt Eſtate, he thought it might have been otherwiſe.

My Lord *Chancellor* was of the ſame Opinion with Mr. Juſtice *Powell*. On Appeal to the Houſe of Lords, this Decree was affirmed, 7 *March*, 1699.

DE

Termino S. Hillarii, 1698.

In Curia Cancellariæ.

Bayly versus *Robson*.

Case 78.

A Mortgagee in Fee lends Money to the Mortgagor upon Bond, and the Mortgagor dies, and his Heir sells the Equity of Redemption.

Mortgagor borrows more Money on Bond, the Vendee of the Heir of the Mortgagor shall redeem the Land without paying the Bond Debt.

Lord *Chancellor*. The Vendee of the Heir of the Mortgagor shall redeem the Land without paying the Money Lent on the Bond.

Earl of *Warrington* versus Sir *James Langham*.

Case 79.

PLaintiff's Father married Sir *James Langham*'s only Daughter; and upon the Marriage-Articles enter'd into between the Defendant and Plaintiff's Grandfather, by which the Defendant covenants, that he would within six Months after the Marriage pay the Plaintiff's Grandfather 10000 *l.* and that his Executors should pay him 10000 *l.* within six Months after his Death, and the Earl

One Covenants on Marriage Articles to pay 10000 *l.* within six Months after his Death; and after growing Old and Infirm, Covenantee would have obliged him to have given Security; but the Court held, that they could not alter this Agreement of the Parties, or make it better than they themselves had; and tho' Executors might be obliged to give better Security for Legacies payable in *Futuro*, that is, because they are in Nature of Trustees, and there is no Agreement one Way or another.

Earl covenanted to make the Wife a Jointure of 1500 *l.* but no Covenant for making any Settlement upon the Children. The Marriage took Effect, and the Defendant paid the 10000 *l.* and the Jointure was made, and both Plaintiff's Father and Mother were dead.

The Defendant being grown old, and having married a 4th Wife, the Plaintiff his Grandson brought this Bill, pretending, that the Defendant was grown very weak in his Understanding, and wholly influenced by his Wife, and it was greatly to be feared would spend or make away his Estate, and not leave wherewithal to pay the 10000 *l.* at his Death; and therefore, to have the Money paid presently, the Defendant having an Allowance of the Interest, or at least, that he might give better Security to pay it when it became due, was the Bill.

The Defendant swore by his Answer, that upon the Treaty of Marriage, no other Security was required for the Money but his Covenant, and if there had, he would never have consented to the Match.

'Twas urged for the Plaintiff, that 'tis but just that every Man should make their Creditors safe, that their Debts shall be paid at all Events, and this Court ought to extend its Authority to prevent them from being defeated; that this Court does enforce Executors to give Security to pay Legacies, which are to be paid in *Futuro*; that this is a Debt *in Presenti*, tho' not yet payable; and that by the Custom of the City of *London* Debtors may be arrested before the Day of Payment to give better Security; and that this Court did grant *ne exeat Regnum*, against Persons that were going away to avoid Payment of their Debts.

On the other Side, 'twas said, that this Bill is not to execute an Agreement between the Parties, but to make a new one; that an Executor was but a Trustee of the Testator's Money for the Legatee, and the Court might take such Methods as were proper to make him execute the Trust; but in that Case there is no Agreement between the Executor and Legatee one Way or other; and

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the Queſtion here is, Whether, when there is an Agreement between the Parties, any Court can alter it? And as for the Cuſtom of *London*, for arreſting a Debtor before the Time of Payment, to give better Security, 'twas much doubted whether there was any ſuch Cuſtom; but if there be, all their Cuſtoms are confirmed by Act of Parliament, and therefore they may do what no other Court can, which have not the ſame Warrant for it.

My Lord *Chancellor* diſmiſs'd the Bill, and an Appeal was brought in the Houſe of Lords and heard; but the Lords put it off from Time to Time (to the End the Parties might agree it) and would do nothing in it, and at laſt there was an Agreement, the Plaintiff complying with the Defendant's Terms, and the Defendant died ſoon after.

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DE

Termino Paſchæ,

1699.

In Curia Cancellariæ.

Caſe 80. **Duke *Hamilton* & ux', verſ. Lady *Gerrard*.**

A Peereſs ordered to produce Deed; confeſſed in her Anſwer on Honour only, not on Oath.

THE Bill was (*inter al'*) to diſcover Deeds and Writings which belonged to the Plaintiff's Wife's Eſtate; the Defendant by Anſwer owned ſhe had ſeveral in her Power, but did not ſet them forth; and on the Plaintiff's Motion ſhe was ordered to produce them on Oath.

But on Application to the Court, that Order was altered, and ſhe was ordered to produce them on Honour only, being in Supplement of her Anſwer, which was only on Honour, being a Peereſs. And ſo it was ordered in a Caſe of *Powel*, late Maſter of the *Rolls*, againſt the Counteſs of *Dorſet*.

Caſe 81. ***Bayly* verſus *Powell*.**

A Woman made her Will, and gave Legacies to all her Relations (which, as appear'd, ſhe had no great Kindneſs for) but did not truſt ſome of them with their own Legacies, but deviſed them to Truſtees, to be put out for their Benefit. She likewiſe gave 50 *l.* to one of her Executors, and 20 *l.* to the other; and the Queſtion was, Who ſhould have the Surplus, which was conſiderable?

My Lord *Chancellor* decreed it to be diſtributed, and the Executor to pay Coſts for inſiſting on it.

DE
Term. S. Trinitatis, 1699.

In Curia Cancellariæ.

Crew verſus *Jolliff.*

Caſe 82.

MY Lord *Crew* made his Will, and deviſed Lands to be ſold for raiſing Portions for the Plaintiffs, who were his Daughters, by a ſecond *Venter*; and this Bill was brought by them and the Executrix, to have the Will proved, and the Truſt performed.

Plaintiff: Daughters by a ſecond *Venter*, brought their Bill againſt the Defendant's Daughters by a firſt *Venter*, to prove their Father's Will; whereby Lands were deviſed to be ſold to raiſe Plaintiffs Portions; and on a Trial at Bar, and Verdict for the Will, Defendants ordered to join in a Sale, but were allowed their Coſts both at Law and in Equity.

Defendants were his Daughters by a firſt *Venter*, and were all married by him in his Life-time, but had not near ſo great Portions as the Plaintiffs, who together with Defendants were his Coheirs, and by Anſwer inſiſted to have the Validity of the Will tried at Bar, which was thereupon ordered accordingly: And at the Trial, Defendants perceiving the Matter againſt them, gave no Evidence; ſo there was a Verdict for the Will. And now the Caſe ſtanding on the Equity reſerved, the Defendants were ordered to join in a Sale, but were to have their Coſts, both here and at Law, upon their joining, tho' it was inſiſted on the other Side, that they ought not to have Coſts, having as now appeared by Verdict, wrongfully occaſioned all the Expence.

Caſe 83.

Dormer verſus *Bertie.*

Where Lands are deviſed to the Executors to be ſold for ſeveral Purpoſes, and the Surplus is expreſly deviſed to them, there can be no Reſulting Truſt for the Benefit of the Heir.

MR. *Robert Dormer* having no Children, but ſix Brothers of the Half Blood, and the Plaintiff, who was his Couſin and Heir of the whole Blood, by Will gives the Plaintiff 50 *l.* to buy him Mourning, gives ſeveral Eſtates to the ſix Brothers and their Heirs ſeverally, and ſeveral other Legacies; and alſo Legacies of 5 *l.* apiece to the Defendants to buy them Mourning, and then ſays, *All the reſt*, &c. *of my Manors*, &c. *Goods, Chattels*, &c. *and all other my Real and Perſonal Eſtate whatſoever, I give to* Charles Bertie, Peregrine Bertie, *and* John Bertie (who were Defendants) *whom I nominate and appoint Executors of this my Will, equally to be divided between them, Share and Share alike, to hold to them, their Heirs and Aſſigns for ever.*

This Bill was brought to have the Surplus a Reſulting Truſt for the Plaintiff the Heir, becauſe the Defendants had Legacies given them by the Will.

But the Court held, that if one can give away the Surplus of his Eſtate, it is done here, and no Truſt for the Heir; and cited the Caſe of *Crompton* verſus *North*, as a much ſtronger Caſe, and yet held no Truſt; and tho' a Legacy given an Executor, may be an Argument againſt him *quoad* the Surplus, when not expreſly given him; yet it can be no Argument at all, when it is expreſly given him. Alſo the Plaintiff the Heir has a Legacy given him, and not the Surplus, which turns the Argument as ſtrong againſt him; and an Appeal being afterwards brought in the Houſe of Lords, this Decree was affirmed that it was no Truſt for the Heir.

Cary

Cary verſus *Pulford*.

Caſe 84.

One ſells his Eſtate of 14 *l. per Ann.* for an Annuity of 26 *l. per Ann.* during his Life, with Clauſe of Re-entry for Non-payment; and the Annuity being in Arrear, and the Purchaſor being unable to pay it any longer, the Grantee re-enters, and deviſes theſe Lands to Defendant, and dies about a Year after; and the Plaintiff having an Aſſignment from the Purchaſor of all his Intereſt, brought this Bill to redeem, on Pretence of its being in Nature of a Mortgage, but was diſmiſs'd, no Redemption being ſought during the Life of the Grantee, whilſt it was uncertain whether the Bargain would be a good or a bad one; and it was only a conditional Purchaſe, and not a Mortgage.

J. S. had an Eſtate, Part Freehold and Part Copyhold, of about 14 *l. per Ann.* which he uſed to ſpend uſually in the Houſe of one *Brick* a poor Alehouſe-keeper, and he at laſt perſuaded *J. S.* to ſell him his Eſtate for an Annuity of 26 *l. per Ann.* and the Plaintiff *Cary* (who was an Attorney at Law) was employed by *Brick* in this Matter, and drew the Deeds, whereby *J. S.* conveyed his Freehold and Copyhold Lands to *Brick*, in Fee for an Annuity of 26 *l. per Ann.* for his Life, payable half yearly; and there was a Condition of Re-entry, in Caſe it were not paid, and *Brick* covenanted to pay it; and the Surrender of the Copyhold was upon the ſame Condition.

Brick entred and paid one Half Year of the Annuity, and then was thrown in Gaol by his Creditors, and his Wife declared he could pay the Annuity no longer, but that *J. S.* muſt take his Land again; and *Brick* had indeed received more out of the Lands, by Sale of Timber and Rents than he had paid for the Annuity; and not continuing to pay it, *J. S.* made a Demand, and re-entred into the Freehold, and was admitted into the Copyhold Eſtate, and lived about a Year in Poſſeſſion, and then died, having firſt made his Will, and deviſed the Land to the Defendant in Fee, and made him Executor; and he was admitted to the Copyhold.

The Plaintiff prevails with *Brick* to convey all his Intereſt to him, and brought this Bill to redeem.

'Twas inſiſted upon, that this was but the common Caſe, where a Man takes Advantage of a Condition for Non-payment of Money at the preciſe Day; and this

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Court always relieves upon Payment of the Money with Intereſt, from the Time it ought to have been paid.

On the other Side 'twas ſaid, that this Caſe is not at all like that Caſe, and that here there can be no Redemption; for that the only Conſideration of *Brick*'s Purchaſe was, that *J. S.* might enjoy a more plentiful Subſtance during his Life, and that he was deprived of by *Brick*'s Non-payment; that during the Life of *J. S.* whilſt it was doubtful whether the Bargain would be a good or a bad one (as it might if *J. S.* had lived long) no Redemption was ſought; and now they cannot have it.

My *Lord Chancellor* ſaid, This is not like the common Caſe; here is no Conſideration paid by *Brick*, but the Annuity only; and therefore I cannot admit of a Redemption, or give any Relief, and diſmiſs'd the Bill.

Caſe 85.
12 *July*.

Daſſern verſus *Bolt*.

Truſt of a Term for Years limited to *A.* for Life, and after his Death to the Heirs of his Body, veſts in them by Purchaſe, and not by Way of Limitation, ſo that *A.* has no Power to diſpoſe of it beyond his own Life.

A Term for Years was aſſigned to *J. S.* in Truſt, to permit *J. Bolt* to enjoy the Profits ſo many Years of the Term as he ſhould live; and after his Death, in Truſt, to permit *Jane* his Wife to enjoy the Profits for ſo many Years of the Term as ſhe ſhould live; and after their Deaths in Truſt to permit the Heirs of the Body of *Jane* to be begotten, to enjoy the Premiſſes during the Reſidue of the Term.

The only Queſtion in this Caſe was the ſame that was made in the Caſe of *Peacock* verſus *Spooner*, *viz.* Whether the Words *Heirs of the Body* were Words of Limitation, and ſo the Term diſpoſeable by *Jane*, or whether they were Words of Purchaſe?

This Caſe was debated before my Lord *Chancellor* the 14th of *March* laſt, and he then ſaid he would not be bound by the Precedent of *Peacock* verſus *Spooner*, if he could find any Difference in the Caſes; but if they were preciſely the ſame, he could not depart from it, and took till this Day to conſider of it. He mentioned

Cranmer's Case in *Dier*, and said, that the Words Heirs of the Body, are Words of Purchase, not of Limitation, and that he had considered of *Peacock* and *Spooner's* Case, and that was a stronger Case than this, and a plainer Affectation of a Perpetuity.

DE Termino S. Mich. 1699.

In Curia Cancellariæ.

Brown versus *Gibbs*.

Case 86.

A Court of Equity won't assist a Dowress who has had Judgment at Law with a *Cessat Executio* in removing a Trust Term

J. *Harris* seised in Fee of certain Lands, made a Settlement of them to the Use of himself for Life, then to Trustees for a Term for Years; then as to one Moiety to his Son *M.* and the Heirs of his Body, with other Remainders over; and the Trust of the Term is declared to be for raising 200 *l.* a-piece for the two Daughters of *M.* and a *Proviso*, that if *M.* or the Heirs of his Body shall pay, *&c.* to the Daughters at 21, or Marriage, the Term to cease.

M. dies without Issue Male, leaving only his said two Daughters: Plaintiff (who was his Widow) recovered Dower at Law with a *Cessat Executio* during the Term, and now brought this Bill against the Defendants (who

were the Daughters) to ſet aſide the Term, that ſhe might have the Benefit of her Recovery at Law.

'Twas inſiſted upon for the Plaintiff, that this Term ought to be abſolutely ſet aſide; for that the Intention of the Settlement could only be to raiſe Portions for Daughters, in Caſe *M.* had Iſſue Male; for if he ſhould leave none, as he did not, the Daughters were to have the Land itſelf, by Virtue of the Limitations of the Settlement, and they cannot raiſe themſelves a Portion out of their own Eſtate; and therefore the Purpoſe for which the Term was intended, failing, the Term in Equity had no Subſiſtence; and tho' where there is a Term generally to attend the Inheritance, that may perhaps prevent a Dowreſs, becauſe it can be intended to be kept on Foot for no other Purpoſe but to prevent Incumbrances; yet it will be otherwiſe in this Caſe, where the Term is declared to be for a particular Purpoſe, which is otherwiſe provided for; and tho' in the Caſe of Lady *Radnor* verſus *Rotheram*, this Court would not ſet aſide the Term, yet that was, becauſe it was againſt a Purchaſor, but there is no Purchaſor in this Caſe, but we come againſt the Heir, and therefore the Term in this Caſe ought to be wholly ſet aſide; and in the Caſe of *Clay* verſus *Snell*, Tenant by the Courteſy was let in againſt ſuch a Term.

2*dly*. Admit that the Term ſhall not be wholly ſet aſide; yet the Plaintiff is intitled to have an Account of the Profits, and to be let into the Benefit of her Dower, paying what is unraiſed of the Portions, if it were a common Mortgage, it cannot be denied but ſhe ſhould redeem; and in this Caſe the Term is only a Security for raiſing theſe Portions, which is the ſame Thing.

Lord *Chancellor*. In the Caſe of *Clay* verſus *Snell*, there was ſuch an Order, but the Point was not debated; but the Queſtion here is, Whether a Court of Equity ſhall make a new Rule? the Judgment that the Plaintiff has recovered at Law, is with a *Ceſſat Executio*, and therefore to ſet aſide the Term would be to relieve her againſt

the very Judgment upon which she founds her Right of Relief. In the Case of Lady *Radnor* versus *Rotheram* there was a Purchasor, it is true, yet the Court did not go upon that Reason; and here the Plaintiff being a Dowress must be contented with the Estate as the Law gives it: the Redemption of a Mortgage is another Case, for the Mortgage is looked upon as a Personal Contract, and the Mortgagee has no Interest beyond his Money, and therefore dismiss'd the Bill.

Parker versus *Blackbourne*. Case 87.

AT the hearing of this Cause it was objected by the Defendant *Blackbourne*, that *J. S.* who was a necessary Defendant was not brought to hearing. Plaintiff shewed they had prosecuted him to a Sequestration, and therefore might go on. Defendant answered, that the Affidavit on which the Process of Sequestration was founded, was insufficient; and upon reading of it, it appeared that the *Subpœna* was left at a Place where *J. S.* had only lodged once, and that above two Years before the Service.

If a necessary Defendant be prosecuted regularly to a Sequestration, the Plaintiff may go on without him against the other Defendants; but serving a Subpœna at a Place where he lodged but once, and that two Years before such Service, is not good.

The Court held it not sufficient Service to go on against the other Defendant alone, unless the Plaintiff would consent to stand in the Place of *J. S.* to all Purposes, which he not doing, the Cause went off for want of Parties.

Lord *Castleton* versus Lord *Fanshaw*. Case 88.

THE late Lord *Fanshaw*, Brother to the Defendant, had by his Will made the Defendant the *Lord Fanshaw* and others his Executors; and after his Debts and Legacies paid, devised all the Residue of his Personal Estate

One by Will devises the Surplus after Debts and Legacies paid to his Wife, and makes *A.* and *B.* his Executors; the Creditors compound for less than their full Debts, from an Apprehension there was not Assets; but Assets afterwards came in. On a Bill by the Wife for an Account of the Surplus, the Executors would have let in the Creditors to their full Debts, which would have reduced the Surplus to little; but the Court would not set aside this Composition, the Creditors having no Bill for that Purpose.

Estate to his Wife, now married to the Plaintiff the Lord *Castleton*.

This Bill was brought to have an Account of the Estate, and the Benefit of the Surplus; the Executors apprehended there wou'd not be Assets to pay the Debts; and there was a Dispute about a Sum of 4000 *l.* whether it should be accounted Assets or not, in Equity; and whilst that Matter was under Debate (it appearing that without that Money there were not Assets, and being doubtful whether that Money would be adjudged Assets or not) several of the Creditors compounded with the Executors to take less than their full Debts; but in the Year 1684, that 4000 *l.* was adjudged to be Assets, and the Executors were desirous that the Creditors might have their full Debts; but that was opposed by the Plaintiff (for that would have reduced the Surplus to little) and then insisted that most of the Creditors Debts were barred by the Statute of Limitations, and that they ought not to be paid at all; but the Defendants the Executors would not plead the Statute; and the two Points to be determined were,

1*st*. Whether the Creditors who had made Compositions for less than their full Debts, upon a Supposition of a Defect of Assets, should now be held to that Composition, when the Executors did not desire it?

2*dly*. Whether the Creditors should be sent to Law to recover their Debts, and the Plaintiff be ordered to make Defence in the Executors Place, and so be enabled to barr them, by pleading the Statute of Limitations, which the Executors would not do.

Lord *Chancellor*. I cannot set aside the Composition the Creditors have made, they have no Bill for that Purpose, and only come in before the Master, therefore they must abide by the Composition, but I can't consent that the Statute of Limitations should be pleaded, therefore their Debts must be paid.

Bamfield

Bamfield versus *Wyndham*.

Case 89.

J. S. devised all his Manors, &c. to Trustees, and their Heirs in Trust, immediately out of the Rents and Profits, or by Sale or Mortgage of the Premisses, or any Part thereof, to raise and levy Money for Payment and Satisfaction of all his just Debts, with Interest and Charges of the Trustees; and if there should be a Surplus of Lands or Money, that to be to his Sisters jointly, and their Heirs, and all my Personal Estate to my dear Wife, whom I make sole Executrix.

One Devises his Real Estate for the Payment of his Debts, and the Overplus he gives to his Sisters, and devises his Personal Estate to his Wife, whom he makes Executrix. The Wife shall have the Personal Estate exempt from Debts.

The Question was, Whether the Wife should have the Personal Estate exempt from Debts, or whether that should be applied in the first Place towards Payment of them, for it was urged, that the Devise being to her, who was made Executrix, she shall take it only as Executrix.

My Lord *Chancellor* took Notice, that the Debts were more than the Personal Estate amounted to, and therefore he must mean, that she should have it exempt from Debts, or he must mean nothing; and there is in this Case no Room to make a different Construction.

Anonymous.

Case 90.

A Second Marriage Settlement is recited to be made in Consideration, that the Wife had parted with the former Settlement, which appeared to be made after the Marriage; but was recited to be made in Consideration of a Marriage Portion secured, but no Proof of any previous Agreement for such Settlement; yet the Court presumed it, and so the second not voluntary against Bond Creditors.

A Settlement after Marriage recited to be in Consideration of a Portion secured, shall be presumed to be in Pursuance of an Agreement previous to the Marriage, tho' no Proof of it, and so good against Bond Creditors.

Case 91.

Small versus Lord *Fitzwilliams.*

Equity won't relieve against the Terms of an Agreement, tho' it may seem in Nature of a Penalty.

A. Sells an Estate to *B.* with general Covenants against Incumbrances, and a particular one against his Wife's Dower; then during the Life of *A.* and his Wife, *B.* articles to sell to the Defendant, and by Articles 'twas agreed, that the Defendant should retain 400 *l.* of the Purchase Money in his Hands for two Years, without Interest; and if in that Time the Wife of *A.* released her Dower, the Defendant to pay 400 *l.* else to retain it absolutely, *A.* dies, his Widow did not release her Dower within two Years, but brought her Writ of Dower, but died before a Recovery of it.

This Bill was to have the 400 *l.* paid, because, but in Nature of a Penalty to secure against the Dower, which is now at an End, and the Purchaser now secured, as well as if she had released within the two Years, or as if after the two Years expired, in which Case, as it was said, this Court would certainly have relieved.

On the other Side it was said, that this was not in Nature of a Penalty, but the Terms of the Agreement, and the Measure of the Satisfaction for the Contingent Incumbrance of Dower; and that the Court would not have relieved on her Release, if after two Years, much less here, where she was so far from releasing, that she brought her Writ of Dower; and if she had recovered it and lived several Years, the Defendant could have had only the 400 *l.* and could not have been permitted, at least, in Equity, as Assignee of *B.* to sue the Covenant of *A.* against his own Agreement in Writing, which took Notice of the Dower, and this Covenant and Agreement to retain the 400 *l.* as a Recompence for it; and as he run the Hazard of her living, he ought now to have the Advantage of her dying.

The Chancellor was of the same Opinion, that he could not be relieved, and decreed accordingly.

Newton versus Sir *Isaac Preston*, Executor [illegible] of *Worts* and *Briggs*, & al'.

Case 92.

THE Plaintiff had made a Mortgage in Fee to *Briggs*, and it was expressed to be in Consideration of 700 *l.* paid by *Briggs*. Sir *Isaac Preston*, who married the Widow and Executrix of *Worts*, pretended the Money was *Worts*'s, and consequently, that he was intitled to it.

Mortgage in Fee for 700 *l.* paid by *A.* but half of the Money was *B.*'s, yet for want of a Declaration in Writing, *B.* was not admitted to read to the Proof of it, so as to create a Trust for him, being against the Statute of *Frauds*.

So this Bill was brought against the Mortgagor to redeem, and was a Bill of Interpleader against the Defendants, that they might dispute the Right of the Money amongst themselves, and that the Plaintiff might have his Estate again, paying what was due to the right Hand.

Sir *Isaac Preston* insisted by his Answer, that the Money was *Worts*'s Money, and that he was intitled to it.

Briggs, by his Answer, swore, that the Money was his, and insisted upon the Statute of *Frauds* and *Perjuries*, against the Pretence of Sir *Isaac Preston*; but confessed there was only 350 *l.* lent; tho' it was intended at first that 700 *l.* should be taken up, and the other 350 *l.* should be employ'd to pay off a Mortgage on the Premisses made to *Worts*, which was excepted in the Covenant against Incumbrances in this Mortgage.

Replications were filed, and Witnesses examined, and all Parties joined in the Examination, and the Question now was, Whether *Preston* should be admitted to read his Witnesses.

'Twas insisted upon for *Preston*, that they ought to be read, for that the Statute of *Frauds* and *Perjuries* was not pleaded, and that this did not seem to be within the Letter of the Statute; that so were many other Cases, in which, notwithstanding, this Court had given Relief; as where a Mortgage was made by Way of absolute Conveyance, and a Defeazance prepared to be executed at the same

ſame Time; and as ſoon as the Mortgage was ſealed, the Mortgagee ſnatched it up, and refuſed to execute the Defeazance; ſo if a Man employs his Steward to make a Purchaſe with his Money, and he take the Conveyance in his own Name, 'twas ſaid, the Court had relieved in theſe Caſes; ſo if a Man makes an abſolute Conveyance, but continues in Poſſeſſion, and pays Intereſt, and takes Acquittances, and a Truſt, that ariſes by Implication of Law, is excepted out of the Statute.

'Twas ſaid for *Briggs*, that this imports to be a Mortgage for Money paid by *Briggs*, and they would prove the Money to be *Worts*'s, upon which a Truſt ſhould follow for them; and tho' a Truſt, which Reſults by Implication of Law be excepted out of the Statute; yet that Truſt muſt ariſe upon the Face of the Deed itſelf; and this Statute muſt take Place, as well in Equity as at Law, tho' a particular Perſon ſhould ſuffer by it. In this Caſe, the Statute is inſiſted on only by way of Anſwer, and not by Plea, for it could not be pleaded here, this being an interpleading Bill, and only to redeem; but to another Bill brought by Sir *Iſaac Preſton* for the Money, the Statute is pleaded; if you enquire upon a Parol Proof, whoſe Money it is, you go directly againſt the Statute, and againſt the Caſe of *Kirk* verſus *Webb*, where it was decreed you cannot make an Eſtate a Truſt, by proving the Money to be ſuch or ſuch a one's; and the Caſes put on the other Side, are not like this, but depend upon Facts, as Acquittances, Poſſeſſion, *&c.*

Juſtice *Powell.* I will not hinder you from reading, for tho' at Law it is not to be allowed, where a Jury may be inveigled by that, which is not proper Evidence; yet here is no ſuch Danger. So the Proofs were read, but he would not Decree the Truſt.

Lewkner versus *Freeman*.

Case 93.

THE Plaintiff had brought his Action against Mr. *Mountague* for lying with his Wife, and 13 *Jan.* 1689, Mr. *Mountague* made a Conveyance of his Land to Trustees in Trust to pay his Debts mentioned in a Schedule annexed to the Deed, and such other Debts as he should appoint, within ten Days in *Hillary* Term following. The Plaintiff recovered 5000 *l.* Damages against Mr. *Mountague*, and brought this Bill to be relieved against this Deed, as Fraudulent against him, and made to defeat him of his Debt.

A. brings an Action against *B.* for lying with his Wife, after which *B.* Assigns his Estate to Trustees in Trust to pay the several Debts mentioned in a Schedule, and such other Debts as he should Name within ten Days, then *A.* recovers 5000 *l.* Damage, and brings his Bill to set aside this Deed as fraudulent, and made to defeat him of his Recovery, but held not to be fraudulent; the Plaintiff being no Creditor at making the Deed, and his Debt recovered, after founded in *Maleficio*; but the others were real Creditors, which it was conscientious to prefer, but for the Surplus the Plaintiff may come in.

'Twas insisted upon for the Defendant, that this Deed is either void at Law against the Plaintiff, or it is not; if it be, the Bill ought to be dismiss'd, because the Plaintiff has Remedy at Law; if it be not void at Law, there is no Reason to relieve the Plaintiff here against the Defendants; the Creditors, who are Creditors, as well as the Plaintiff, and before him, for he was no Creditor at the making the Deed; and they are Creditors more to be favoured in a Court of Equity, than the Plaintiff; for they are Creditors for Money lent and paid, or Wares sold and delivered; and the Plaintiff has only a Demand, which sounds in Damages for a Tort.

'Twas said for the Plaintiff, that if there had been but one Creditor, it might have been more proper to have gone to Law; but even then we might have come here, for this Court has a Concurrent Jurisdiction with the Common Law; but as this Case is, and as there are many Creditors, where some Debts may be good, and some bad, we must go on here, for where there are several Considerations of a Deed, and one be good, that

will support the whole Deed at Law, but not so here, and there is no Difference between a Debt by Contract, and a Debt founded upon a Tort.

Cur. This Deed is not fraudulent, either in Law or Equity; for such Debts as are named in the Deed, the Plaintiff was no Creditor at the making of the Deed; and tho' it were made with an Intent to prefer his Real Creditors before this Debt, when it came afterwards to be a Debt; yet it was a Debt founded only in *Maleficio*; and therefore it was conscientious in him to prefer the other Debts before it; but the Plaintiff may have an Interest in the Surplus, after Payment of Debts, provided for by the Deed, let him declare, if he will Controvert the Debts, and come in upon the Surplus after the Debts mentioned in the Schedule, or appointed within 10 Days pursuant to it, are satisfied.

Case 94.

Loyd versus *Carew*.

THE Decree made in the Court of *Chancery* in this Case, having been reversed by the House of Peers, 27 *Jan.* 1697, without any further Direction; and upon the Appellant's Petition, 24th *March* 1697, a further Order made by the Lords, that upon the Appellant's paying to the Respondent, or into the *Court of Chancery* for his Use, they should be put in Possession of the Estate.

How a Guardian is to be appointed.

The Appellants applying to the *Court of Chancery* for an Execution of that Order (the Respondent, who was an Infant, being gone beyond Sea, and his Mother, who was his Guardian in this Suit, being dead) the Court said, they could do nothing in the Matter, till a new Guardian were appointed, which, as it was said, could not be but by bringing the Infant into Court, or his praying a Commission to have a Guardian assigned him; and upon search the Appellants did not find any Precedents where a Guardian had been otherwise assigned; and tho' the Respondent's Father had, by his Will, named other Persons to

be

be his Guardian, in Case of the Death of his Mother before his Age of 21; yet they (tho' they acted in other Matters) would not intermeddle in this.

Wherefore the Appellants petitioned the Lords, That Receivers might be appointed to receive the Rents, and pay thereout to the Respondent the Interest of the 4000 *l.* and the Overplus to the Appellant.

Upon hearing the Petition, the Lords order'd Proof should be made in the *Court of Chancery* of the Mismanagement of the Estate; and that the Guardians named in the Will should be decreed to Name a fit Receiver, and if they would not, then the *Chancellor* to name one.

Accordingly an Order was afterwards made by the Master of the *Rolls*, in the Absence of the Lord *Chancellor*, for a Receiver to be appointed by a Master, who should give Security as usual.

D E

DE Termino S. Hillarii, 1699.

In Curia Cancellariæ.

Case 95. **Willis versus Fineux.**

Devisee for Life, remainder over, commits a Forfeiture by Levying a Fine, and making a Mortgage, for which on Ejectment the Remainder Man recovered, yet the Mortgagee having no Notice of the Will, had a Decree to hold, during the Life of the Mortgagor; and the rather, for that the Mortgagor had made an Affidavit, that there was no Will, and that he was Heir at Law.

URsula *Pierce* being seised in Fee of devised it to *Pierce Fineux*, the Father, for Life; and after to *Pierce Fineux* his Son in Fee; and by the same Will devised 400 *l.* to *Pierce Fineux* the Son to be paid at 21, and made *Pierce Fineux* the Father (who was her Brother and Heir) Executor, and died, leaving 2000 *l.* Personal Assets, and *Pierce Fineux* the Son an Infant.

The Father spent all the Assets, and made a Lease for Years of the devised Lands to one *John Robb*, by Way of Mortgage, for securing 200 *l.* borrowed of him, and covenanted in the Deed to levy a Fine to the Mortgagee, for corroborating the Term, and declared, that the Use of the Fine should be to the Mortgagee for the Term, and after to *Fineux* the Father, and his Heirs; and a Fine was levy'd accordingly to *Robb*, and his Heirs; and the Mortgage was afterwards transferred to the Plaintiff's Testator *Fineux*.

The

The Son came of Age, and brought his Ejectment upon the Forfeiture committed by his Father, by levying the Fine, and recovered; and now the Plaintiff brought this Bill to be relieved.

The Master of the *Rolls* decreed, that the Mortgagee should hold and enjoy against the Son, during the Life of the Father, and the Father to pay Costs, and be foreclosed, unless he paid the Money.

Note, The Father on making the Mortgage, had made Affidavit, that *Ursula Pierce* died Intestate, tho' he had proved her Will long before; and that he knew of no Incumberances upon the Estate.

Jackson versus *Farrant*.

Case 96.

A Portion was divised to a Daughter to be raised out of a Real and Personal Estate, and to be paid at 21, the Daughter marries, and dies before 21, leaving a Child.

A Portion devised to a Daughter out of a Real and Personal Estate, to be paid at 21, without saying, or Marriage; the Daughter marries, and dies before 21, yet by Reason of the Marriage it was then due, Marriage being the Cause of Portions.

'Twas insisted upon, That the Portion was not to be raised, nor was ever due, because she died before the Time of Payment; and the Marriage in this Case is no more to the Payment, than any other Thing would have been; and tho' it might have been more reasonable to have had the Testator to have limited it to be paid at 21, or Marriage, yet he has not so done; and the Court must judge according to what is done, and not according to what had been more reasonable to have been done.

Cur. Let an Account be taken of the Estate, and then the Court will give its Opinion, but my Lord *Chancellor* inclined strongly, that the Portion was payable, and said, the Reason of all the Cases go that Way; for they go upon this, that there being no Marriage, that did not happen, which was the Cause of the Portion.

DE Termino Paschæ, 1700.

In Curia Cancellariæ.

Case 97. *Danby* versus *Lawson*.

If one be taken up on an Attachment, either in Process or in Execution after a Decree; yet in both Cases on his appearing before the Register, he is to be discharged, and to answer the Interrogatories at large, not in Custody; and if he be continued in Custody, the Court on Motion and appearing before the Register, will discharge him.

DEFENDANT who was a Feme Covert, was taken upon an Attachment for Nonperformance of a Decree, and the Officer refused to bring her before the Register to appear, but carried her to *Newgate*, and now she mov'd the Court that she might appear before the Register, and be discharged out of Custody; and the Question was, Whether by the Course of the Court she is to be discharged upon her appearing, or to answer in Custody?

It was agreed, that upon an Attachment in Process, she must be at large upon her appearing, but the Plaintiff's Council said it was otherwise in Execution; but all the Registers and ancient Practisers were of Opinion that it was the same in both Cases; and Mr. *Guidott* the Register cited the Case of one *Swain*, who was taken up for not paying 80 *l.* and discharged upon appearing, and that upon Debate; but on an Attachment in Execution the Sheriff may insist upon Security proportionable to the Duty, but in Process it is only 40 *l.* Penalty; and

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upon appearing ſhe is to be at large, and not to anſwer in Cuſtody, tho' the Interrogatories be filed; and upon the Regiſter's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond.

The Maſter of the *Rolls* ſaid there was undoubtedly a Difference between a Contempt to the Honour of the Court, and the Breach of a Decree; upon the firſt the Party is to anſwer *in Vinculis*, but not upon the latter; ſo ſhe was diſcharged (but Interrogatories being filed) ſhe was ordered to anſwer in four Days, or ſtand committed.

Rockley verſus *Kelley*.

Caſe 98.

Whether Exceptions to a Decree of the Commiſſioners of Charitable Uſes may be heard before the Maſter of the *Rolls*, by the Statute 43 *Eliz.* or only before the *Chancellor*.

A Decree was made by the Commiſſioners of Charitable Uſes, and Exceptions were taken to it, and they now came on before the Maſter of the *Rolls*, and he and moſt of the Barr were of Opinion, that by the Statute of *Eliz.* the Maſter of the *Rolls* may hear an Appeal, as the Chancellor may, and may affirm the Decree and give Coſts, notwithſtanding the Statute mentions only the Chancellor; but Mr. *Edwards* the Regiſter ſaid, it had always been an Exception, and therefore the Maſter of the *Rolls* would do nothing in it.

Shute verſus *Shute*.

Caſe 99.

Divorce *a Menſa & thoro*, if it continued during the Coverture; Equity won't aſſiſt the Wife in recovering her Dower, but will leave her to the Law; neither will the Spiritual Court grant her Adminiſtration, nor Chancery decree her a diſtributive Share.

THE Bill was to have Dower of her Husband's Real Eſtate, and a Share of his Perſonal Eſtate for herſelf and Child by him, he dying inteſtate; and Adminiſtration granted to another, becauſe there was a Divorce between her Huſband and her, *a menſe & thoro.*

Maſter of the *Rolls*. As to the Dower, whether you are intitled to it, go to Law, there being no Impediment, and therefore as to that, the Bill muſt be diſmiſs'd.

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The granting Administration is in the Ecclesiastical Court, but the Distribution does more properly belong to this Court; but since in the Ecclesiastical Court she is not such a Wife as is intitled to Administration, I will decree no Distribution, therefore the Bill must be dismiss'd as to that too; and if you can repeal that Sentence, you will then be intitled to Distribution.

Note; Friday 26 *of* April, 1700, *the Earl of* Jersey, *principal Secretary of State, was sent to fetch the Great Seal from my Lord* Chancellor, *but having no Warrant in Writing to demand it, my Lord* Chancellor *refused to deliver it; but the next Day the Secretary came with a Warrant. and then the Seal was delivered to him; and* Sunday *the 5th of* May *the Custody thereof was committed to the two Chief Justices and Chief Baron, with a special Commission to seal Writs; and they sat at* Serjeant's-Inn *the* Monday *following to seal Writs; and the Master of the* Rolls *sat in the Court of* Chancery *to hear Causes, by Virtue of a Commission, in the usual Form to hear Causes in* Absentia Cancellarii; *and afterwards the Custody of the Great Seal was given to Sir* Nathan Wright, *Knight, one of the King's Serjeants.*

DE
Term. S. Trinitatis,
1700.
In Curia Cancellariæ.

Ball verſus *Burnford.*

Caſe 100.

The Wife joins with the Husband in letting in an Incumbrance on her Jointure Lands, and barring the Eſtate Tail, and then limits the Uſes to the *Husband for Life*, Remainder to the Wife for Life, Remainder to their Daughters: The Daughters are not Purchaſors, ſo as to ſhut out a Judgment. Creditor of the Husband's antecedent to the barring of the Eſtate Tail, but the Limitation to them voluntary, unleſs the Conſideration of the Wife's parting with her Jointure, had extended alſo to the Limitation to the Daughters.

EDmund Anderſon being Tenant for Life of Lands then as to part to his Wife for Life, for her Jointure, then to the Heirs Male of their two Bodies, acknowledges a Judgment to the Plaintiff, and then enters into Covenants with *J. S.* that he and his Wife wou'd join in a Fine, which ſhould be in the firſt Place to *J. S.* and his Heirs by Way of Mortgage, for ſecuring a Sum of Money, then to the Huſband for Life, then to the Wife for Life for her Jointure, then to the Sons of them two in Tail, then to the Daughters in Tail; and a Fine was levied accordingly: And there were other Incumbrances upon the Eſtate, *prior* to the firſt Settlement, which *J. S.* the Mortgagee, or the Defendant *Burnford* (for whom he was a Truſtee) purchaſed in.

Edmund Anderſon died without Iſſue Male, leaving two Daughters of that Marriage, who were likewiſe Defendants.

Plaintiff brought his Bill to be let into the Benefit of his Judgment, paying the Mortgagee what he had really paid for that by the Fine; the Estate Tail was barred, and the Judgment let in, and this Settlement on the Daughters was voluntary.

'Twas admitted, that the Fine had barred the Estate Tail created by the first Settlement, but insisted that the Daughters were Purchasors by the Mother's joining to barr her Jointure, and letting in the Incumbrance; and that that Consideration did extend to the Estate of the Daughters as well as her own.

My Lord *Keeper* was of Opinion, that this might have been made a good Consideration for both; but it was not expressed in the Deed to be any Consideration for settling the Estate upon the Daughters, but was a voluntary Gift of the Wife to her Husband, and therefore the Daughters Estate must be taken to be voluntary; and so a Judgment Creditor ought to have the Assistance of this Court before them.

Case 101.

Spicer versus *Hayward*.

Plaintiff had seduced his Wife's Sister, and had several Children by her, and gave her some Bonds for Payment of Money, as a Provision for her and her Children; and these Bonds being sued, he brought a Bill, suggesting that the Bonds were given for no valuable Consideration, but was dismiss'd with good Costs.

THE Plaintiff had seduced his Wife's Sister, and had several Children by her, and had given her some Bonds for Payment of Money which were intended as a Provision for her and the Children, and afterwards gave her a Weekly Allowance: One of the Bonds was put in Suit against him, and he brought this Bill, suggesting that the Bonds were not given for Money lent, or any valuable Consideration, and besides that they were satisfied (meaning the Weekly Payments) and upon the Defendant's Answer, and Plaintiff's Letters, the Case appeared *ut supra*.

My Lord *Keeper* said he could do no more against the Bail then decree the Payment of what was due on the Bonds for Principal and Interest, with good Costs, by a

 short

ſhort Day, or elſe the Bill to be diſmiſſed with Coſts, and ſaid 'twas a Pity he could do no more.

Specring verſus *Lynn* & ux' & *Field* & al'.

Caſe 102. 2 Vern. 376. S. C.

A Miſtake in the Title of an Order amended, tho' to charge a Surety, who gave a Recognizance to abide the Order of Hearing.

DEfendant gave Security in the uſual Manner, to abide the Order on Hearing; and then a Decree was made, and a Report upon it, and the Recogniſances ſued againſt *Field* the Surety for Non-performance, who pleads in Abatement that there was no Order on Hearing; they reply, and ſet forth the Order on hearing the Report, the Order for confirming *Niſi*, and the Order for making that abſolute; but Defendants rejoin, that in the Title of the two laſt Orders the Words *&* *ux'* were omitted, but the Body of them was right, and ſo they were not Orders in that Cauſe; yet on Motion the Title of the Orders was amended by Order *Niſi*, *&c.*

It was now inſiſted that they ought not againſt the Defendant, who was but a Surety, and cited the Caſe of *Northcott* verſus *Northcott* this Term, where on a Decree againſt Baron and Feme, all the Proceſs of Contempt was right, till the Serjeant at Arms, and the Order for that was only againſt the Baron, and ſo was the Sequeſtration; and after the Husband's Death a Sequeſtration went againſt the Wife's Jointure, and it was moved to be amended, but the Party could not prevail.

On the other Side it was ſaid, that this was only the Clerk's Miſtake, and was to carry on the Juſtice of the Court, and therefore ought to be amended, and cited the Caſe of *Earl* and *Earl* this Term, where Affidavit was order'd to be filed after, to ſupport a Sequeſtration, being really made before the Sequeſtration, and the Order of amending was made abſolute in the principal Caſe.

Case 103.

Procter versus *Cooper.*

Mortgagee enters, and the Profits are not sufficient to answer the Interest, yet the Arrears shall not carry Interest, but the Costs and Charges must.

HEnry *Gascoign*, in 1641, made a Mortgage in Fee for 300*l.* to *Gilbert Cooper*, of Lands of about 30 *l. per Ann.* in 1652, the Mortgagee took Possession, and in 1660 devised the Lands to *Anthony Cooper*; in 1686, the Devisee brought a Bill to foreclose, to which the Defendants pleaded a Settlement prior to the Mortgage, but that was found to be fraudulent; and the Wife of the Mortgagor had recovered a third Part as Dower against the Mortgagee, so that the Profits did not answer the Interest of the Money, which was then 8 *l. per Cent.* and there had been Infancies on the Plaintiffs Part for several Years.

Master of the *Rolls.* The Plaintiff must redeem, and shall pay 8 *l. per Cent.* only to the Time of the Ordinance of Parliament that reduced the Interest of Moneys; and tho' the Profits were not sufficient to answer the Intent, yet the Arrears cannot carry Interest, but the Costs and Charges must.

Case 104. 2 Vern. 380. S. C.

David Eyton versus *John Eyton* & *Jane* ux' & *An. Eyton.*

Counterpart of a Settlement admitted sufficient Evidence of the Settlement, and a Conveyance decreed pursuant to it.

THomas *Eyton* had three Sons, *Benjamin*, *Randall* and *David*, and the 6th of *October*, 2 *Car.* 1. made a Settlement of all his Lands to the Use of himself for Life, Remainder to the Use of his Wife for Life, then as to Part to the Use of *Benjamin* and the Heirs Male of his Body; Remainder to *Randall* and the Heirs Male of his Body; Remainder to *David* and the Heirs Male of his Body: And as to the other Part, to *Randall* and the Heirs Male of his Body; Remainder to *Benjamin* and the Heirs Male of his Body; Remainder to *David* and the Heirs Male of his Body: And as to other Part, to *David* and the Heirs Male of his Body; Remainder to *Benjamin* and

the Heirs Male of his Body; Remainder to *Randall* and the Heirs Male of his Body; with Remainder of the whole to *Thomas* in Fee.

Benjamin was a Lunatick, and had no Iſſue Male, and only two Daughters, *Jane* and *Anne* (Defendants) *Randall* died without Iſſue; *David* had Iſſue *David* the (Plaintiff) and *John* the Defendant who married *Jane* the eldeſt Daughter of *Benjamin*.

David exhibited his Bill againſt *Benjamin* and *John*, and *Jane* his Wife, ſetting forth, that *Thomas* his Grandfather had made ſome Settlement, whereby Part of the Eſtate did then belong to him, and charged that the Settlement was come to the Defendant's Hands, and prayed a Diſcovery of it.

John anſwers, and ſets forth that he had ſuch Settlement in his Cuſtody, and ſets forth the Limitations to be *ut ſupra*, but that he could not part with it, becauſe he was adviſed it did belong to *Benjamin*.

The Cauſe reſted upon this Anſwer ſeveral Years, and *Benjamin* died without Iſſue Male; and his ſaid two Daughters were his Coheirs, and alſo Heirs to *Thomas* the Grandfather.

Then the Plaintiff mended his Bill, and made *Anne* a Party, and charged further, that in the Settlement by *Thomas*, there was a *Proviſo*, that if any of his Sons died without Iſſue Male, ſo that the Land ſhould come to any of the Brothers, they ſhould pay to the Daughter of ſuch Brother ſo dying, ſo much, and that he had tender'd, and was ready to pay according to the *Proviſo*.

To this amended Bill *John* anſwers and ſays, he does not underſtand the Limitations of Settlements, and that he does not know whether he had ſet them forth right in his former Anſwer, that he knew of no other Settlement but what was mentioned in his former Anſwer, which he had ſeveral Years ſince delivered to *Benjamin*, and had no Copy of it.

Jane his Wife anſwered by herſelf apart, and *Anne* anſwered, and by their Anſwer inſiſt upon their Title, as Heirs to *Benjamin*, and deny that they ever ſaw or heard of any Settlement made by *Thomas* the Grandfather.

The Plaintiff had renewed a Counterpart of the Deed of Settlement, and there was a *Proviſo* as was mentioned in the amended Bill; and there was ſome Proof that ſome Part of the Land had been ſold by *Randall*, and enjoyed accordingly, but no other Proof of the Settlement.

At the Hearing it was inſiſted, that the Huſband's Anſwer, whereby he had confeſſed the Settlement was no Evidence againſt his Wife (being in a Matter of Inheritance) and that without other Evidence of the Settlement they could not make Uſe of this, which they pretended to be a Counterpart, yet the Maſter of the *Rolls* decreed a Conveyance to the Plaintiff, and an Account of the Rents and Profits; and on Appeal this Decree was confirmed by my Lord Keeper, who thought, as this Caſe was, the Counterpart would of itſelf be Evidence enough at Law of the Settlement. *Sed Quære de hoc.*

Caſe 105.
2 Vern. 401.
S. C.

Burnett verſus *Kinaſton.*

A Feme Covert being intitled to 400*l.* on a Mortgage in Fee, Huſband articles to lay out this Money in a Purchaſe of Lands to be ſettled as a Proviſion for him and his Wife, and their Iſſue; the Wife dies without Iſſue; the Huſband takes Adminiſtration to her, and by Will deviſes this Money to the Plaintiffs before Payment of it, and dies. On a Bill brought againſt the Adminiſtrator *de bonis non, &c.* of the Wife, held there could be no Relief, the Law being with the Defendants. This Money belonged to the Adminiſtrator *de bonis non, &c.* of the Wife, and is diſtributable amongſt her next of Kin.

THE Plaintiff's Father had married the Defendant's Aunt for his ſecond Wife, and ſhe was intereſted in ſeveral Mortgages for ſeveral Sums of Money, amounting in all to 3200 *l.* (which was her Fortune) among which, one was a Mortgage in Fee for 1400*l.* from her Brother the Defendant's Father; after Marriage, the Plaintiff (who was a Soldier of Fortune) executed Ar-

2 ticles

ticles between himſelf of the one Part, and ſome of his Wife's Relations of the other Part, whereby he agreed that he would take but 200 *l.* of his Wife's Fortune to his own Uſe, and that the remaining 3000 *l.* of his Wife's Fortune ſhould be inveſted in a Purchaſe of Lands which ſhould be ſettled to the Uſe of himſelf for Life, then to the Uſe of his Wife for Life, then to the firſt and other Sons of the Marriage in Tail Male, with a Term to Truſtees to raiſe Portions for younger Children; then to the Heirs of the Body of the Wife, and then to the right Heirs of the Husband.

The Wife was no Party to theſe Articles, and ſoon after died without Iſſue, ſo that all the Remainders mentioned in the Articles to the Huſband's Remainder in Fee were ſpent, and the Huſband ſurvived and took Adminiſtration to her, and came to an Account with *Kinnaſton* the Mortgagor for the 1400 *l.* and he promiſed to pay the Money within three Months, and in Conſideration thereof had an Abatement of 50 *l.* but he did not pay the Money at the Time; and before it was paid *Burnett* the Huſband died, but before his Death made his Will, and thereby deviſed this Money (after Debts paid) to be equally divided amongſt the Plaintiffs, who were his Children by his firſt Wife.

Adminiſtration *de bonis non, &c.* to the ſecond Wife was granted to the Defendant *Mills*, and the Queſtion was, Whether theſe Articles made by *Burnett* after his Marriage, were ſuch an Alteration of the Property of the Wife's Money, as that the Husband had Power to diſpoſe of it by his Will, or whether it belonged to the Adminiſtrator *de bonis non, &c.* of the Wife, and was to be diſtributed amongſt the next of Kin?

For the Plaintiffs it was argued, that tho' this Mortgage were an Eſtate of Inheritance in the Wife, yet being but a Security for Money, 'tis in Conſideration of Equity a Chattel Intereſt only, and ſhall go to the Executor, and not to the Heir, and is therefore diſpoſeable by the Husband without his Wife, as other Chattel

Intereſt-

Interests of hers are; and Nobody can deny but that a Husband can assign over or release a Thing in Action of his Wife's; and the Wife's Consent or joining in the Articles would not have alter'd the Case, for of the Personal Things of the Wife, the Husband has a disposing Power without her Consent; and if this be not a good Disposition, then neither the Husband nor Wife, or both, can after Marriage dispose of a Personalty of the Wife; and whereas it has been said on the other Side, that there is a Difference between a Temporary Interest and an Absolute Interest, and in this Case the Interest of the Husband is only a Temporary Interest, that Distinction is of no Force where the Disposition is made during the Continuance of such Temporary Interest, as it was in this Case; and it's not the same as if it had been a Disposal by Will, which 'tis urged would not have been good, for there the Interest of the Husband is spent, and the Wife in by Survivorship before his Will can take Place; as if there be two Joint-Tenants, and one devises his Moiety, and dies, this Court will not help against the Survivor; but if in his Life-time he had agreed to assign over, though voluntarily, this Court would have made it good.

On the other Side it was urged that they had the Law with them, and no Reason for a Court of Equity to interpose; that the Articles were after Marriage, and voluntary, and that the Wife had done nothing to bind herself; that the Husband, notwithstanding the Articles, might have sold or assigned; or if the Articles would have bound him, yet they could not bind his Wife, for he can only bind her by executing his legal Power, *viz.* by releasing or receiving the Money; and his Power was but Temporary, and not Absolute, and he had made no farther Disposition during the Time he was Administrator to his Wife; that notwithstanding these Articles, the Wife must have joined in Suit for this Duty, and the Benefit of it wou'd have survived to her; and the legal Interest of a Feme Covert cannot be bound, but by a

 Fine,

Fine, nor the equitable Intereſt without a Decree. And Major General *Egerton*'s Caſe was cited, where a Mortgage went to a Wife who ſurvived; and a Caſe where it was ſaid that a Legacy being deviſed to a Feme Covert, her Husband afterwards became a Bankrupt, and the Commiſſioners aſſigned over this Legacy, and then the Bankrupt died, and decreed the Wife ſurviving ſhould have the Legacy.

Lord *Keeper*. If a Huſband aſſigns a Bond of his Wife's for a valuable Conſideration, this Aſſignment will not bind the Wife if ſhe ſurvives; and ſo 'tis in this Caſe, for the Wife claims *Paramount*; if one Jointenant grants a Rent-Charge, can the Grantee come againſt the Survivor to make it good? Surely no: Perhaps an Agreement to aſſign might be otherwiſe, tho' I think it would not: Here is nothing but the Act of the Huſband without any Conſideration, and the Plaintiffs have no Title, let the Bill be diſmiſs'd.

DE.
Termino S. Mich.
1700.
In Curia Cancellariæ.

Case 106. **Foster versus Foster.**

Devisee of a Rent Charge of 100 *l.* *per Ann.* to be issuing out of the Rents and Profits of Lands which were worth but 50 *l.* with Power of Distress, enters into the Lands, and by Will devises the Arrears of the said Rent-Charge, the Devisee shall recover in Equity.

WIlliam Forster by Will devises an Annuity of 100 *l.* *per Ann.* to *A.* his Father, for Life, to be issuing out of the Rents and Profits of *Black Acre*, and to be paid half Yearly, with Clause of Distress, and devises *White Acre*, and also *Black Acre* charged with the said Annuity to the Defendant, his Nephew, and his Heirs.

A. entered into *Black Acre*, and received the Profits till his Death (which was five Years) not being sufficient to Answer above 50 *l.* *per Ann.* of the Annuity, and then by Will reciting the Annuity in Arrear, devises the said Arrears to the Plaintiff his Wife, and made her Executrix; and she insisted, that this was also a Charge on *White Acre* by the last Clause (but that was given up) at least *Black Acre* was chargeable, and the Plaintiff ought to hold over, because the 100 *l.* *per Ann.* was to be satisfied before the Defendant had any Thing.

On the other Side, it was said, that the Devise of the Annuity out of the Rents and Profits, &c. could at most amount but to a Devise of the Land itself for Life; tho'

tho' if it had been a Sum in Groſs, it would be otherwiſe, that it was a legal Charge, and the Plaintiff's Remedy was by Diſtreſs, if that was not barred by *A*'s Entry which was his own Fault.

But it was decreed for the Plaintiff; for his Intent was plain, that his Father ſhould have 100 *l. per Ann.* for his Proviſion, that a Deviſe of the Rents of Lands is the ſame as a Deviſe of the Lands themſelves; and it's the ſame Thing alſo as to the Profits, and there can be no more iſſuing out of Lands than the whole Value, and the Court will decree a Sale of the Lands to raiſe a Sum deviſed out of Lands for Children at ſuch an Age, if the Profits will not do it, and the Deviſe of *Black Acre* (charged with the ſaid Annuity) charges it in his Hands by the ſaid Words, for it could not be charged before.

Welby verſus *Thornagh*, & Ux'. & econt'. Caſe 107.

WELBY's Bill was to have the Defendants (the Wife being Aunt and Heir to Sir *Richard Earl*) join in a Sale of his Lands, which he had deviſed to the Plaintiff (his Uncle by his Mother's Side) charged with Payment of his Debts. *Thornagh*'s Bill was to ſet aſide the Will, as obtained by Fraud and Circumvention, and to have the Deeds and Writings.

The Court was clear of Opinion, that a Will, as well as a Deed may be ſet aſide in this Court for Fraud and Circumvention; but that no ſuch Thing was made out in this Caſe, but the Heir inſiſting on it, it was directed to an Iſſue *deviſavit vel non*; and the Bills to be retained, in the mean Time; my Lord *Keeper* was alſo clear of Opinion, that if a Verdict went for the Will, the Heir, tho' a Feme Covert, might be decreed to levy a Fine, and join in the Sale.

A Will as well as a Deed may be ſet aſide in Chancery for Fraud or Circumvention.

Moyſe

Case 108.

Moyse versus *Gyles*.

One Jointenant makes a Deed of Gift of his Moiety to his Wife, as a Provision for her, and with Intent to sever the Jointure; yet being made to the Wife herself, and so void in Law, and without Consideration, Equity cannot relieve.

TWO Jointenants of a Church Lease, one whereof being taken Sick in a Journey, to sever the Jointure, and provide for his Wife, sends for the School-Master of the Town (who was the only Person he could get to come at him) and acquainted him with his Intentions, and desired him to prepare an Instrument for that Purpose, the School-Master drew a kind of Deed of Gift of the Lease from the sick Man to the Wife, which he executed, and died; and this being to the Wife, and void in Law, she would have made it good here, but was dismiss'd, being voluntary, and without Consideration.

Case 109.
2 Ven. 383. S. C.

Colchester versus *Arnot*.

Lessee of a Prebend makes an under Lease, and the Lease being far spent, and the [illegible] refusing to surrender, in Order to enable him to renew, tho' he offer'd Security to make up the Tenant's Lease again; the Lessee brings his Bill to compel a Surrender, but is dismissed, there being no Agreement in the Lease for that Purpose.

LESSEE of a Prebend makes an under Lease, and the Lease being pretty far spent, he requested the Tenant to surrender, to enable him to renew, and offered to give any Security to grant him a new Lease for so many Years as he had to come in his old one; but the Tenant was obstinate, and would not, unless his Landlord comply'd with some Demands of his, upon which he brought this Bill to enforce him to a Compliance.

But my Lord *Keeper* said, tho' it were a Benefit to the Plaintiff, and no Prejudice to the Defendant; yet there being no Agreement in the Deed for that Purpose, he could do nothing in it, and likned it to Bills of Conformity, and Bills for inclosing a Common, in which Cases, if one will stand out, they cannot be decreed.

How

How versus *Nicholl.*

Case 110.

A Man had a Term in gorss, and then purchased the Inheritance, and the Term is declared to attend the Inheritance; then he becomes Receiver of the King's Revenue; he is liable from the Time of his becoming Receiver, and the King shall have the Benefit of the Term; but if the Term had been Mortgaged to one, who had no Notice of its attending the Inheritance, he should have held it against the King.

Mitchell versus *Eades.*

Case 111. 2 Vern. 391. S. C.

A Sea Captain being out of Service, makes a Letter of Attorney irrevocable to the Plaintiff, to receive all such Wages and Pay as shall after become due to him; then he goes into Service, and dies, there being at the Time of his Death Wages due to him: The Defendant, as principal Creditor, takes out Administration to him; and the Plaintiff, who was a Creditor likewise, brought this Bill to have an Account and Payment of the Wages, and likewise to have a Satisfaction for his Debt.

One being indebted to *B.* makes a Letter of Attorney to him to receive all such Wages as shall after become due to him, then goes to Sea, and dies, this Authority is determined so, that he cannot compel an Account of Wages, if any due at making the Letter of Attorney, much less of what after became due; but the Administrator must pay according to the Course of Law.

The Master of the *Rolls* was of Opinion, that tho' there had been Wages due at making of the Letter of Attorney; yet he could not have decreed the Wages to the Plaintiff against the rest of the Creditors, much less as this Case is; therefore decreed the Parties to go to an Account, and the Defendant to pay according to the Course of Law, but dismiss'd the Bill as to the demand of Wages.

Case 112.

2 Vern. 382. S. C.

Champernoon versus *Gubbs*.

One having granted a Rent-Charge with Clause of Distress, and Covenant that the Land should be liable to the Distress, dies, and the Rent-Charge being greatly in Arrear, and no Distress to be had, and the Land Untenanted; yet the Court would not Decree the Grantor to set out a Distress, or that the Grantee should hold the Land till satisfied, nor vary the Agreement of the Parties.

A Rent Charge was granted the Plaintiff, with Clause of Distress, and a Covenant in the Deed, that the Land should be liable to the Distress; the Grantor died; the Defendant, who thereby became Owner of the Land, was an Infant, and his Mother, under whose Guardianship he was, suffered the Rent to run greatly in Arrear, and several Suits were brought at Law; and by Reason of the frequent Distresses and Suits, it was difficult to get Tenants for the Lands, and the best was not made of them, nor so much Cattle kept on the Lands as else would have been; and after the Defendant came of Age, the Rent for the Reasons aforesaid came more and more in Arrear.

The Plaintiff pretending, that no sufficient Distress could be had on the Land, brought this Bill to have a Decree to hold the Land till he should be satisfied; and that the Land might be decreed to stand charged with the Arrears and growing Rent; but the Bill was dismiss'd, because it did not appear, that there was any Fraud in the Defendant to prevent the Plaintiff of his Legal Remedy, which might intitle this Court to give him another.

The Plaintiff petitioned for a Re-hearing, and the 17th of *July* the Cause was heard before the Lord *Keeper*.

'Twas said for the Plaintiff, that if the Rent had been granted without any Clause of Distress, or other Remedy at Law, he might have had Relief here; and shall we be in a worse Condition, because some Remedy at Law is provided, tho' not a sufficient one, and the Case of Dr. *Thorndyke* and *Allington*, 26 *Jan.* 18 *Car.* 2. *Morgan* versus *Cough*, and *Morgan* versus *Heron*, were cited, where there was a Devise of a Rent, and no Remedy at Law,

 and

and Poſſeſſion of the Land was decreed here; and 'twas ſaid, where a Bond has been entered into, with Condition to convey Lands, this Court will Decree the Conveyance, tho' the Parties have agreed the Meaſure of the Damages.

On the other Side, it was urged, that the Caſes cited were not like this here; you aſk to alter the Nature of the Thing which is a Rent, and a certain Remedy for it by Diſtreſs; and you aſk the Land, inſtead of the Rent; and if you would have us decreed to ſet out a Diſtreſs ſufficient to Anſwer all the Arrears; it is the ſame Thing as a Decree againſt us to pay the Money which we cannot in Juſtice be decreed to do.

My Lord *Keeper* continued his former Opinion, and cited the Caſe of the Earl of *Warrington* verſus *Langham*, againſt the Plaintiff, and affirmed the Decree.

Cutterback verſus *Smith*.

Caſe 113.

2 Vern. 295. S. C.

Where Lands are deviſed to Executors to be ſold for Payment of Debts, the Money becomes legal Aſſets, and Debts ſhall be paid in a Courſe of Adminiſtration.

A Man deviſed Lands to *A.* and *B.* in Truſt to be ſold for the Payment of his Debts, and makes the ſame Perſons Executors, and the only Queſtion was, Whether Bond Debts ſhould have a Preference, or all Debts be paid *Pari Paſſu?* The Difference was taken, when the ſame Perſons that are Truſtees to ſell the Lands, are Executors likewiſe, and where not for in the former Caſe, after the Land is ſold, it is Aſſets, even at Law; and therefore to decree them to pay otherwiſe than according to the legal Courſe, would be to decree a *Devaſtavit*.

My Lord *Keeper* took Time to conſider of it, and afterwards delivered his Opinion, that Bond Debts muſt be preferred, and the 23 *December* 1700, at *Powis-Houſe*, in the Caſe of *Bickman* verſus *Freeman*, was a like Decree and Difference.

Sir

Case 114. **Sir *John Champant* versus Lord *Ranelagh*.**

LORD *Ranelagh* was *Vice Treasurer* of *Ireland*, and Sir *John Champant* was his Deputy Receiver there, and my Lord was indebted to him upon his Account, and gave him a Bond for the Money; and it was then agreed between them, that three Fourths of what he should receive for my Lord's Fees, should be applied in Discharge of the Bond; but afterwards my Lord drew Bills on him, for Sums which amounted to more than all the Fees he had received, and Sir *John* paid the Bills; and the Question was, Whether this should be adjudged a Waiver of the Agreement by my Lord, or whether should be adjudged a Folly in Sir *John* to have paid these Bills; and therefore he to be allowed no Interest on the Bond, because he might have applied this Money to discharge the Bond.

My Lord *Keeper* was of Opinion, that the drawing these Bills, and paying of them, did not amount to any Waiver or Alteration of the Agreement; and therefore Sir *John*'s Receipts must sink the Interest upon the Bond.

A Bond made in *England* and sent over to the Obligee in *Ireland*, the Money to be paid there, held it should carry *Irish* Interest.

Note, The Bond was made in *England*, and sent over to my Lord's Correspondent in *Ireland*, and the Money to be paid there, and it was not mentioned what Interest should be paid; and my Lord *Keeper* was of Opinion, that it should carry *Irish* Interest.

Case 115. 2 Vern. 395. S. C.

Harvey versus *East-India* Company.

After Service of a Writ of Execution of a Decree against a Corporation, the next Process, is a *Distringas*, and after that a Sequestration, which being once awarded, they can never after come and pray to enter their Appearance, as they might have done on the *Distringas*, which Issues for that very Purpose, to compel them to appear; but the appearing being past, the Process must go on, because the Appearance being only in Favour of Liberty, can be of no Service to a Corporation, which cannot be committed.

THE Plaintiff had a Decree against the Defendants for a great Sum of Money, and served them with a Writ of Execution in the usual Form; and they

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not performing the Decree, a *Distringas* (the next Process against a Corporation) was awarded, and 40 *s.* Issues returned, and after, on a Motion, a Sequestration was ordered *nisi, &c.* and now they pray'd to enter their Appearance with the Register upon the *Distringas*, and to discharge the Sequestration.

'Twas urged, this might well be done, because it was only a Contempt, from which a Corporation ought to have Liberty, and an Opportunity to clear themselves, as well as a Common Person; and tho' they cannot Answer the Contempt on Oath, nor be committed if found against them; yet there is no Reason why they should not have an Opportunity to defend themselves. A Peer shall contest a Contempt, and must enter his Appearance, yet he shall not Answer upon Oath (unless, perhaps, for a Contempt against the Peace) and if condemned, he cannot be committed; but a Sequestration goes absolutely, and a Corporation must Answer Interrogatories, as they answer a Bill, *viz.* under their Common Seal, and cited the Cases of *Danby* versus *Lawson*, *Foster* versus *Christ's Hospital, Hill.* 11 *W.* 3. and a Case where an Appearance was enter'd on a *Distringas* in Process for want of an Answer: And a Sequestration must not go, right or wrong, and a Corporation has no other Way to defend themselves against the Sequestration, but this.

It was likewise urged, that the very Writ of *Distringas* is to distrain them to appear, and mentions to be, only because they cannot be attached by their Persons; yet now they would not have us appear, and the Court is *ad faciend. & recipiend.* and 'tis absurd to say, that Judgment should be given against us, without having an Answer.

On the other Side, 'twas said, that the Examination for a Contempt was for the Benefit of the Plaintiff, and is to be upon Oath; which, if such Appearances were admitted to Corporations, would be lost to the Plaintiff; that the admitting of such Appearances is only in Favour of Liberty, and not necessary to Corporations, which cannot

be committed; that against a private Perſon, the Plaintiff ſhall have Body, Lands, and Goods; againſt a Corporation Sequeſtration only; and as the Plaintiff has many diſadvantages againſt a Corporation, 'tis reaſonable he ſhould loſe no Advantage, and as a common Perſon has Advantage by appearing, ſo has the Plaintiff too; for if found in Contempt, the next Proceſs is a Commitment, which elſe would be a Proclamation, and then a Commiſſion of Rebellion, *&c.* and the Caſes cited are of very little Moment; for theſe are of Appearances ſaid to be enter'd, in Purſuance of an Order, ſo not of Courſe; and it does not appear any Notice was taken of them in Court; but they paſſed *ſub ſilentio*; that they have now a proper Time to defend themſelves upon this Order, for the Sequeſtration is order'd only *niſi Cauſa*; and they might ſhow for Cauſe, that they have paid the Money, or performed the Decree (if the Truth be ſo.)

Cur. The Defendant's Precedents are of no Weight, becauſe in all of them, natural Perſons, as well as a Corporation, were Defendants; and the Orders being in general Terms, may be reaſonably expounded to mean only the firſt, and alſo are all *ex parte*, and abſolute, the Party is not to be heard upon any ſubſequent Proceſs, why more upon this? the Appearance enter'd of common Perſons is in Favour of Liberty; and the Plaintiff has a mutual Benefit, which here he cannot have, nor can the Defendants loſe their Liberty. If you had come and ſhown any Irregularity, that might have been Cauſe to Diſcharge the Order; but ſince you do not, let the Order be made abſolute.

Then they pray'd a further Day to be heard, which being granted, they appear'd, and made ſeveral Objections to the Service.

1*ſt.* That there were ſeveral Variances between the Writ of Execution, and the Copy of it left with the Company; but upon reading of them, the Variances appeared not to be material, ſo that Objection was over-ruled.

2*dly.* For that the Writ of Execution was not of the whole Decree, for the Decree *quod computet* was left out, and nothing in, but the Decree to pay the Money ſtated by the Maſter's Report; but that was over-ruled, for that it's not neceſſary the Writ of Execution ſhould contain any more.

3*dly.* 'Twas objected, that the Service was upon the Governor of the Company only, who has no Power over the Company's Caſh, and could not pay the Money decreed; and 'twas ſaid, the Service ought to have been on the Committee; but this was likewiſe over-ruled, for then, if the Committee would not meet, or not admit the Party in to ſerve them, there could be no Service, ſo the Order was made abſolute.

Barret verſus *Wells* & econt'.

Caſe 116.

THE Plaintiff's Teſtator lent *William Wells* 500 *l.* upon Mortgage for 1000 Years, afterwards the Mortgagor deviſed the mortgaged Premiſſes to the Defendant's Father, for ever, and his Heirs lawfully begotten, upon Condition, that he pay all my Debts, ſo that none may be a ſufferer by me.

Lands in Mortgage running thro' three Deſcents, and the Perſon intitled to redeem, not knowing how much was due for the Intereſt, is informed by the Heir of the Mortgagee, that it was conſiderably leſs than really it was; whereupon he ſettles it upon his Marriage, as Subject only to ſo much; thoſe who derive under that Settlement, ſhall redeem accordingly, without being obliged to pay the Sum concealed for the Fraud.

The Deviſee lets the Intereſt run in Arrear, and there being 10 *l.* due for Intereſt, gave Bond for it to the Plaintiff, and afterwards there being 100 *l.* more due for Intereſt, gave Bond for it, and likewiſe for 100 *l.* more due for Intereſt; afterwards the Deviſee of the mortgaged Premiſſes died.

The Defendant his Son and Heir, being about to marry the Daughter of one *Parry*, he went to the Plaintiff to enquire what was due on the Mortgage; and the Plaintiff being deſired not to diſcover the Bonds by the Defendant's Mother, and as it was believed with the

Defen-

Defendant's Privity, for fear of spoiling the Match, she said, there was only 500 l. due, and that all Interest was paid, and that upon Payment of that, she would deliver up the Mortgage.

Parry, upon that agrees to marry his Daughter to the Defendant, and Articles were made for settling these mortgaged Premisses upon the Marriage, and the Marriage took Effect; and now this Bill being brought to fore-close, and a cross Bill to redeem.

The Defendant insisted, he ought to redeem without paying the 200 l. secured by the Bonds, for that, as it was said, the taking the Bonds was Payment of the Interest, and had turned the Debt into another Plight, and the Mortgage was thereby discharged of it; or however, that the Plaintiff having informed *Parry*, that there was only 500 l. due upon the Mortgage, and in Consideration of that, he married his Daughter, and had the Lands settled, she shall not now be admitted to charge the Lands, with any more than she then insisted to be due; and that the Devisee of the mortgaged Premisses to the Defendant's Father, was an Entail, and so not chargeable with the Bonds.

On the other Side, it was said, that the taking the Bonds for the Interest, was only as a farther Security, and did not discharge the Land; and that the Devise was a Fee-Simple, and not an Entail.

The Master of the *Rolls* was of that Opinion, as to the first, and said, he inclined to be so as to the other; but was of Opinion, that the Discourse of *Barret* to *Parry* had discharged the Lands from being liable to more than what she then pretended to be upon them, and so decreed a Redemption upon Payment of the 500 l. with Interest from that Time, and without Costs.

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Hitchin versus *Hitchin*. Case 117.

> Devise of Lands to a Man's Wife, who was intitled to Dower, without saying in Recompence or Satisfaction of her Dower, held to be a voluntary Gift, and no Barr of Dower.

SAmuel *Hitchin*, the Plaintiff's Grandfather, made a Mortgage for 500 Years, which was satisfied, and after his Death assigned to *Sarah* his Relict (who was intitled to Dower of his Estate) and died, leaving *Gyles*, the Plaintiff's Father, his Son and Heir; who being indebted made his Will, and thereby devised several Lands to his Wife *Sylvestra*, but did not mention it to be in Satisfaction of her Dower, and devised the Residue of his Lands to his Executors till his Debts paid.

Sylvestra brought her Writ of Dower, and recovered her Dower, and 220 *l.* Damages, the Heir brought his Bill to be relieved against the Recovery, and she brought her Bill to discover the Profits, and to set the Term out of the Way.

'Twas urged, that this Devise must be in Satisfaction of Dower, and that the Heir might have help'd himself at Law, by setting up the Mortgage against her; and tho' he had omitted to do that, yet he ought to be help'd here, and the rather because she is a Plaintiff likewise, and comes for the Aid of this Court to be help'd against the Mortgage Term.

> Where [illegible] will [illegible] a satisfied Mortgage against the Heir in Favour of a Dowress.

Lord *Keeper*. *Sylvestra*'s Bill is only against the Trustees of the Father, to have an Account of the Real and Personal Estate, and to discharge the Debts; you don't pretend but a Dowress is to be relieved against a satisfied Mortgage, so she must in this Case: You don't insist upon Lady *Radnor*'s Case to be against it. The Heir must be relieved against the Damages till the Debts paid; let a Master see when sufficient was raised to pay the Debts and Defalkt out of the Recovery; the Devise is not to be looked upon as any Recompence or Barr of Dower, but a voluntary Gift.

Note; It seems the Defalcation out of the Recovery must be in Proportion to the Profits *Sylvestra* receives on her being admitted to the Term.

Case 118. ***Johnson* & ux' versus *Northey* & al', and *Blake* & al' vers. *Johnson* & ux' & al'.**

Decree to set aside a Deed in 1638, whereby a Deed in 1684 took Place, being signed and inrolled; and after that the Lands in the last Deed being devised to be sold for Payment of Debts, and a Bill brought to have them sold accordingly; and to have the Benefit of the first Decree has opened that Decree again, and left the Defendants at Liberty to controvert it over again.

THE Lady *Henrietta Wentworth*, who was Daughter and Heir of the Lord *Wentworth*, and Grand-daughter and Heir of the Earl of *Cleveland*, by a Deed in 1684, settled her Estate after her own Death upon her Mother the Lady *Philadelphia Wentworth* and her Heirs; but this Deed was secretly made, and always kept by her: Afterwards she made her Will, and thereby devised the Estate to her Mother for Life. Afterwards when she lay on her Death-bed, she called for the Deed, which till then she had kept privately by her, and delivered it to her Mother, and told her she gave her all she had, and soon after died.

After her Death, the Lady *Lovelace*, who was Aunt and Heir to Lady *Henrietta*, and also Heir to both the Earl of *Cleveland* and Lord *Wentworth*, pretended a Title to the Estate, under a Settlement made in 1638, and otherwise.

Thereupon the Lady *Philadelphia* brought a Bill against her to discover her Title, and to have the Settlement delivered up, as being revoked.

Lady *Lovelace* by her Answer insisted on her Title, under the said Settlement of 1638, and mentioned, that the Deed of 84 was unduly obtained, or was a Trust for Lady *Henrietta*, and consequently for her who was her Heir, and that the Will was not fairly gained.

In this Cause Witnesses were examined, and Publication passed, and the Cause heard; and a Decree by Default against Lady *Lovelace*, that the Settlement of 38 should be delivered up, and a perpetual Injunction *nisi, &c.* and no Cause being shown, that Decree was made absolute, and signed and inrolled; then

Lady *Lovelace* died, leaving the Lady *Johnson* her Grand-daughter and Heir.

The Lady *Philadelphia* made her Will, and thereby devised all her Estate, (being the Estate mentioned to have been before settled upon her by her Daughter) to the Defendant *Northey*, Sir *Robert Howard* and Sir *William Smith* (both since dead) and their Heirs in Trust, to be sold for the Payment of her Debts and Legacies, and the Surplus to be equally divided between them.

The Creditors and Legatees of Lady *Philadelphia* brouht a Bill against Sir *Henry Johnson* and his Wife, and *Northey* the surviving Trustee, in Lady *Philadelphia*'s Will, to have the Benefit of the Decree obtain'd by her against the Lady *Lovelace*, and that the Estate might be sold, and their Debts and Legacies paid.

Sir *Henry Johnson* and his Wife brought their Bill upon their Title, under the Settlement in 38, or as Heir at Law, and to have the Deed of 84, and the Will of Lady *Henrietta* set aside.

Publication passed in the Creditor's Cause, and then *Northey* put in a Plea to the Bill of the former Decree, and other Matters; but that Plea, upon the arguing, being ordered to stand for an Answer, the Cause proceeded, and Sir *Henry Johnson* examined several Witnesses as to the Deed of 84, and Will of Lady *Henrietta*.

The Causes coming now to be heard, it was insisted on by Sir *Henry Johnson*, that the Creditor's Bill being to have the Benefit of the Decree obtained against Lady *Lovelace*, he was not bound by that Decree, tho' signed and inrolled, but was at Liberty to controvert all that Matter over again, before the Court could decree the Execution of that former Decree.

My Lord *Keeper* seemed to be of Opinion, that the Creditors, who are in Nature of *Cestui que Trust*, having brought their Bill to execute the Decree, had opened it, and at last, after long Debate, a Trial was directed, if the Deed of 38 were revoked or not.

Case 119.

Bickham versus *Freeman.*

THE Case was no more than this; a Man devises Lands to be sold for Payment of his Debts, and makes the Devisees Executors; and the Question was, Whether the Debts should be paid in Proportion, or according to the Course of Administration.

My Lord *Keeper* having taken Time to consider of it, till this Day, now delivered his Judgment, that they must be paid in a Course of Administration, because where the same Person is Executor and Trustee, the Land when sold is legal Assets, otherwise; when the Trustee is Executor, there they shall be paid in Proportion.

DE Termino S. Hillarii.

1700.

In Curia Cancellariæ.

Palmes versus *Danby*.

Case 120.

A Guardian during the Infant's Minority, may, without the Direction of a Court of Equity, pay off a Mortgage, and the Interest of any other Real Incumbrance.

IN this Case one Question was, Whether when an Estate descends to an Infant, subject to Incumbrances, the Guardian must or may (without the Direction of a Court of Equity) apply the Profits to discharge the Incumbrances, or the Interest of them? Or whether they should not be accounted Personal Estate, and so the Administrator of the Infant intitled to them, if the Infant die during his Minority.

The Court held, that the Guardian might without the Direction of the Court, pay the Interest of any Real Incumbrance, and the Principal of a Mortgage, because that is a direct and immediate Charge upon the Land; but not any other Real Incumbrance.

A Dowress has a right to redeem a Mortgage, and hold over till satisfied.

Another Question was, Whether a Dowress has a Right to redeem a Mortgage? And my Lord *Keeper* declared his Opinion to be, that she had, paying her Proportion of the Mortgage Money, and to hold over for the rest; and distinguished it from Lady *Radnor*'s Case, for there was a satisfied Term, and the Husband had a Power to barr her, by assigning over the Term, which he did; but here it's only a Mortgage, and against the Heir.

Bromley versus *Jefferys*.

Case 121.
2 Vern. 416.
S. C.
One settles his Estate on Trustees, to be sold for Payment of his Debts, with Power of Revocation; then he marries a Daughter, gives her a Portion, and covenants, that the Husband shall have the Estate 1500 *l.* cheaper than any other; after he by Will revokes the Settlement, gives the Husband 1500 *l.* and dies; this Legacy held to be in Satisfaction of the 1500 *l.* secured by the Settlement.

A Case was ordered to be made, and was thus; Sir *Rowland Berkley* having a considerable Real Estate, and being much indebted, and having no Son, but several Daughters, made a Settlement of his Estate on himself for Life, then to Trustees and their Heirs in Trust, to sell, and to apply the Money for Payment of Debts, and other Purposes mentioned in the Deed, with a Power of Revocation.

Afterwards he married one of his Daughters to the Plaintiff *Bromley*, and gave a considerable Portion with her, and entred into a Deed, wherein, after the Recital of this Settlement, he covenanted, that if Mr. *Bromley* should be minded to purchase his Estate of his Trustees, they should sell it him 1500 *l.* cheaper than any other Purchasor would *bona fide* pay for it; provided that if Mrs. *Bromley* his Daughter should die without Issue Male, the Deed to be void.

Afterwards Sir *Rowland*'s Incumbrances being much altered, he makes his Will, and therein reciting the Settlement he had made of his Estate to be sold, he does by his Will revoke that Settlement, and devises the Estate to his Grandson *Green* (who was an Infant) but devises a Term of ten Years therein to his Executors for the Payment of his Debts and Legacies, and gives 1500 *l.* to the Plaintiff *Bromley*, 500 *l.* to his Wife, and 100 *l.* apiece to their Children, and dies.

The Plaintiff brought this Bill to have a specifick Performance of the Covenant, and that he might have the Estate 1500 *l.* cheaper than any one else wou'd give for it.

The Defendant insisted, that the Legacies devised by the Will, were in Satisfaction of the Covenant, and had examined Witnesses to prove it; and the Plaintiff ex-

amined Witnesses to prove the contrary, for the Will mentioned nothing of the Matter one Way or other.

At the Hearing, it was debated, whether any of these Proofs could be read.

The Plaintiff's Council urged, they might, and that it was but like my Lord *Cheyncy*'s Case, where a Man devises to his Son *John*, and has two Sons of that Name, Witnesses may be examined to prove which he meant; the Defendants would have it presumed, that this Legacy was, in Satisfaction of the Covenant, the Will says no such Thing, and we would read Witnesses against this Presumption; and the Cases of *Forster* versus *Munt*, and *Cordell* versus *Woden*, &c. where it was said, Witnesses were read to such Purpose.

Lord *Keeper*. As Matters have been settled since my Lord *Falkland*'s Case, they cannot be read; for it would be a Way to introduce Incertainty, and make the Court Arbitrary; and that Case was much stronger than this, for there the Evidence intended to be made Use of were Letters of the Testator's own Writing, and yet were rejected; and the Evidence was not read in my Lady *G*[illegible]*borough*'s Case. to make any Construction in Law, for [illegible] making one Executrix, is a Gift in Law of the Personal Estate; but the Proof read was to Oust a Construction in Equity, which has been but a late one, neither that, where a particular Legacy is given to an Executor, he shall be ousted of the Residue.

The Master of the *Rolls* said, he thought it was plain from the Will itself, that the Legacies were intended to be in Satisfaction of the Covenant; for it recites the Settlement, and revokes it, which is by Consequence a defeating of the 1500 *l.* but however, a Court of Equity is not obliged to decree a Specifick Execution of all Covenants or Agreements, be they on never so valuable Considerations, but will consider all Circumstances, and Sir *Rowland*'s Circumstances, and the Condition of his Fortune being so much altered, and thereupon his Purpose so much changed, that if a Specifick

Execution

Execution of this Covenant should be decreed, the whole Will would be defeated; and therefore he thought that it ought not to be executed in this Case; and of the same Opinion was my Lord *Keeper*, and dismiss'd the Bill.

Case 122.
2 Vern. 416. S. C.

A Portion of 4000 *l.* devised out of Lands to a Daughter, if she married with the Consent of *A.* and *B.* to be paid at her Age of 21, or Day of Marriage, which should first happen; but if she married without such Consent, then she was to have 1000 *l.* only; the Daughter dies about six Years of Age. Decreed her Portion should sink for the Benefit of the Heir, and not be Subject to Distribution, tho' strongly insisted it was a Legacy, and as such recoverable in the Spiritual Court.

Tate versus *Fettiplace*.

SIR *Rowland Lacy* seised of the Manor of *Pudlicot*, made a Mortgage for 1000 Years to *Henry Heyling*, for securing 6000 *l.* and Interest, and afterwards by Deed and Fine settled the same to the Use of himself for Life, Remainder to the Defendant *Rowland Lacy* his Son in Tail, with other Remainders over, Remainder to himself in Fee, and being seised of several other Estates, most of which were Reversions expectant on Estates for Lives; and being greatly indebted to other Persons, and having one Daughter, named *Arabella*, made his Will in Writing, and thereby devised the said Lands, and all his Lands not before settled in Jointure to Dame *Arabella*, his Wife, and to Sir *Edmund Fettyplace* and *Charles Fettyplace*, and their Heirs upon Trust, that they should by Sale thereof raise Money to pay his Debts, provided, that upon Payment of Mr. *Heylin*'s Mortgage, the said Mortgage should be kept on Foot for securing the Portion therein after mentioned, to *Arabella* his Daughter, and his other Legacies and Debts, if the Lands devised were not sufficient to pay the same, and thereby devised to his said Daughter 4000 *l.* for her Portion, if she married with the Consent of his Wife, and Trustees, to be paid at her Age of 21, or Day of Marriage, which should first happen; but if she married without such Consent, then he gave her 1000 *l.* only for a Portion, and no more, and made his Wife Executrix, and died.

Arabella the Daughter died soon after, being about six Years of Age.

Afterwards Dame *Arabella* the Widow, married the Plaintiff *Yates*, and took out Letters of Administration to *Arabella* her Daughter, and made her Will, and her Husband Mr. *Yates* Executor and Devisee of all, who by Virtue thereof, pretended to be intitled to a Moiety of the 4000 *l.* devised by Sir *Rowland* to *Arabella* the Daughter; and also to so much of the Personal Estate of Sir *Rowland*, as was not specifically devised away; for that he had made Provision for Payment of his Debts by his Lands, and had, as was pretended, directed the Person who drew his Will, to give his Personal Estate to his Wife; but that he had omitted to do, because, he thought, that the making of her sole Executrix, was a Gift of it in Law, and had examined one *Brooks* an Attorney, who drew the Will, to that Purpose.

Mr. *Yates* brought his Bill to have an Account of Sir *Rowland*'s Personal Estate; and that he might have the Surplus of it, and for a Moiety of *Arabella*'s 4000 *l.*

Rowland Lacy the Infant Heir, brought a Cross Bill against him, for an Account of the Real and Personal Estate of his Father. (Dame *Arabella* having in her Life Time been the only acting Trustee.)

The Creditors brought their Bill to have the Trust performed, and their Debts paid.

An Account being directed to be taken, and the Master having made his Report on hearing these Causes before my Lord *Somers*, assisted by the Master of the *Rolls*; as to the first Demand of Mr. *Yates*'s touching the Surplus of Sir *Rowland*'s Personal Estate, Mr. *Brooks*'s Deposition (which was admitted to be read) was insisted on, and Lady *Gainsborough*'s Case relied on, as a Case in Point; but as to that, the Bill was dismiss'd, and the Court took farther Time to consider of his Demand of the Moiety of *Arabella*'s Portion; but before any Judgment was given therein, the Seal was given to Sir *Nathan Wright*, and then Mr. *Yates* petitioned to have his Cause reheard.

The Cause coming now to be reheard before my Lord *Keeper*, assisted with the Master of *Rolls*, as to the Demand of the Personal Estate, the former Order was confirmed and the Bill dismiss'd.

As to the other Demand of the Moiety of *Arabella's* Portion, 'twas insisted, that it was a Legacy to her, and might have been sued for in the Spiritual Court (tho' it were charged on Land) and no Court would have prohibited them, and by their Law it would have been recovered, tho' she died before the Time of Payment; and where this Court holds Plea of Matters of Ecclesiastical Conusance, they ought to judge according to the Civil Law; that this Case differs from all the Cases cited on the other Side, touching the sinking of Portions in Lands, they being all in Cases of meer Trusts, wherein the *Chancery* alone had the entire Jurisdiction, and where no Suit lay in the Ecclesiastical Court for it, and might have given Sentence for the Appellant, according to the Civil Law.

On the other Side, it was said, that the Precedents were the same in Effect with this, and particularly the Case of *Pawlet* and *Pawlet*, and no real Difference between them; and of that Opinion was my Lord *Keeper* and the Master of the *Rolls*, and therefore dismiss'd the Bill, as to this Demand likewise, and this Dismission was affirmed in the House of Lords.

Case 123.

Blake versus *Johnson.*

One being in an undue Manner drawn in to execute a Conveyance of his Estate, after makes his Will, and thereby devises all his Land to be sold for Payment of his Debts, his Creditors may set aside the Conveyance, having a Right in Nature of an Equity of Redemption, as the Testator himself had, tho' urged, that it was but in Nature of a Chose in Action, and not assignable.

SOME Deeds having been unduly obtained from the Lord *Lovelace* some few Months before his Death, which he being sensible of, made his Will, and devised all his Estate in the first Place for Payment of his Debts, and the Surplus to other Persons.

The

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The Creditors brought this Bill to be relieved againſt theſe Deeds, and to have the Lands ſubjected to the Payment of their Debts.

'Twas objected, that if theſe Deeds had been unduly obtained (which was deny'd) yet this Deviſe was but in the Nature of a Right of Action, which was not aſſignable, and therefore the Creditors could have no Benefit of it.

But it was held by my Lord *Keeper* and the Maſter of the *Rolls*, that this is but in Nature of an Equity of Redemption, which may be aſſigned, as he himſelf might have come here to be relieved againſt theſe Deeds, ſo may his Deviſees.

Juxon verſus *Brian*.

Caſe 124.

MY Lord *Keeper* declared his Opinion in this Caſe without Debate, that where Lands are deviſed to Truſtees to raiſe Money for ſeveral Purpoſes; and they raiſe the Money out of the Profits, the Land is thereby diſcharged, and the Perſons concerned muſt reſort to the Truſtees.

Tidcombe verſus *Boddington*.

Caſe 125.

If the Colonel of the Army make an Aſſignment of the Off-reckoning of any Year, for the Cloathing of that Year, and has before anticipated theſe Off-reckonings of that Year, for the Cloathing of the foregoing Year; he ſhall be anſwerable in his own Perſon, if the Agreement be ſo worded, as to charge him; and that the Off-reckonings of the following Year are ſo far diverted, by altering the Eſtabliſhment of the Regiment, as not to be applicable to make good theſe Payments.

PLaintiff being Colonel of a Regiment of Foot in his Majeſty's Service, enter'd into an Agreement with one *Moyer*, (who, it ſeems, was a Partner with the Defendant *Boddington*) for cloathing his Regiment for the Year 1696; the Contract was in Writing, and was made in the Name of one *Chambers*, and was, that *Moyer* ſhould furniſh the Regiment with ſuch and ſuch particular Cloaths, at ſuch particular Prices.

At the making of the Bargain, it was agreed between *Moyer* and the Plaintiff, that the Plaintiff was not to be

be liable in his own Person or Estate for the Money; but that *Moyer* was to be paid out of the Off-reckonings, and he was intrusted by the Plaintiff to have the Contract drawn accordingly.

When the Contract was presented to the Plaintiff, by him to be executed, he desired Time to advise with his Council, whether it were so drawn, as that he could not be charged in his own Person or Estate, and *Moyer* assuring him it was so drawn, he thereupon executed it, and the same Time delivered *Moyer* an Assignment for his whole Money out of the Off-reckonings upon the Paymaster; and by Virtue of that Assignment about 300 *l.* was received.

By the Course of Payment in the Army, when an Assignment is made of the Off-reckonings for Payment of the Cloathing of any Year, if the Off-reckonings of that Year are not sufficient to compleat the Payment, he that has such Assignment, is to receive out of the Off-reckonings of the following Year, till his Payment is compleat, and the Regiment being in Arrear for their Cloathing, the Assignment that was to them that cloathed the Army in 1695, was not paid by the Off-reckonings of that Year, but took up good Part of the Off-reckonings of the Year 1696.

In the Year 1697, an Act of Parliament was made, which appropriated the Off-reckonings of the Year 1697, to the Payment of the Cloathing for that Year only, and no other; so that *Boddington* was thereby prevented from having any Satisfaction out of the Off-reckonings of that Year, as else by the Course of Payment in the Army he would have had; and this Regiment happening, just at that Time to be removed into *Ireland*, and put upon a new Establishment, *Boddington* was thereby prevented from having any further Benefit of his Assignment upon the Off-reckonings, and was like to lose his Money.

Thereupon consulting with his Lawyers what to do, he was advised, that as the Contract was, he might

Charge the Colonel in his own Right; whereupon he brought his Action at Law against him, in the Name of the Trustee and *Tidcombe*, having unadvisedly pleaded, that the Cloaths were not deliver'd according to the Contract, the Plaintiff at Law recovered the whole Sum mentioned in the Contract.

Whereupon Colonel *Tidcombe* brought this Bill to be relieved against the Recovery at Law.

Both *Boddington* and *Moyer* did by their Answer confess, that they were to expect their Payment out of the Off-reckonings, and that the Colonel was not to be charged himself in his own Right, unless he did some Way divert them, or prevent them from having the Benefit of them; and that in Case the Off-reckonings of any Year did not suffice to pay the Cloathing of that Year, he who had an Assignment on the Off-reckonings, was to receive out of the Off-reckonings of the subsequent Year, till his Payment was compleated; but insisted, that *Tidcombe* had diverted the Off-reckonings of 1696, *viz.* by the said Assignment for the Cloathing of 95; and that at the Time of the Contract, they knew not that the Regiment was so indebted, but the contrary to that was proved, and made *Moyer* on that Account insist upon having higher Prizes.

At the Hearing, it was urged for the Plaintiff, that if this Contract was so drawn, as to Charge the Colonel in his Person, it was a Fraud in *Moyer* (who was intrusted with the drawing of it) to have it so drawn, and he, upon the executing of it, affirmed it was so drawn, as not to charge the Colonel in Person, and thereby prevailed on him to execute it, without advising with Counsel, as else he would have done; that *Moyer* and *Boddington* both knew of the Assignment for the Cloathing of the Year 95; and 'twas confessed by them both, that the Colonel was not to be charged in Person, if he did not prevent them of the Benefit of the Off-reckonings, and that he had done no other Act whatsoever.

For the Defendants, it was said, they were honest Creditors, and had recovered at Law, and that a Court

of Equity, ought not to hinder them from getting their Money; that no Parol Proof of the Plaintiff's ought to be admitted against the Agreement in Writing, that the Assignment to the former Cloathier was an Anticipation made by the Plaintiff, and that he ought to make good the Money.

Lord *Keeper. Boddington* does admit by his Answer the Course of Payment in the Army, but says, where Payment of the Off-reckonings is prevented by the Colonel, or the Party any Ways hindred from receiving the same, the Colonel is to be answerable; and by the Establishment of the Army, the Off-reckonings of every Year are to answer and pay the Cloathing of that Particular Year; and the Off-reckoning of 96 was anticipated by the Colonel for the Cloathing of the Year 95, and surely one Witness to a Parol Agreement is not sufficient to set aside a Contract in Writing, and therefore the Plaintiff cannot be relieved for more than what is paid, which must be discounted out of the Money recovered.

Afterwards the Plaintiff appealed to the House of Lords, and the Cause was heard by them, but they delayed giving Judgment, on Purpose that the Parties may agree the Matter, which they did; then the Decree was confirmed by Consent, tho' the Lords seemed disposed to reverse it.

Case 126.

Luke versus *Bridges* and *Christy*.

Scrivener or Attorney puts out his Client's Money on a Security, which he might on the least Inquiry have found to be defective, or even where he had Notice of Ejectment delivered on a Prior Mortgage; yet could not be charged in Equity to answer the Money.

MR. *Thomas Christy* (to whom the Defendant *Christy* and others were Executors) had been a considerable practising Attorney, and was Brother-in-Law to the Plaintiff *Luke*, who having 1000*l.* out at Interest, and the same being to be paid in, desired it might be paid to her Brother-in-Law Mr. *Christy*, and that he would get her a Security for it: Accordingly the Money was paid in to him, and he, without any further Directions from the Plaintiff, or acquainting her at all of the Matter,

in *March* 1692, lent it out on a Security of a Mortgage, made by Sir *Charles Bickerstaff* to one Mr. *Robert Marsham*, for securing 250 *l.* which afterwards was increased to 1100 *l.* and was by him assigned to the Defendant *Bridges* for securing that Sum; and the Assignment was taken in the Name of the Plaintiff, and she had some of the Title Deeds delivered to her, and received 68 *l.* of the Interest from Sir *Charles Bickerstaff*; but it fell out that the Security was pre-incumbred, and would not answer the Money.

The Plaintiff brought this Bill to have the Money made good to her, either by the Executors of her Brother-in-Law, who had put out the Money, or by Mr. *Bridges*, who had the Security before upon a Re-assignment, and had long before brought a Bill against Sir *Charles Bickerstaff* to have the Redemption foreclosed, and a Decree had been obtained by Sale of the Estate, and Mr. *Hungerford* had been allowed the best Purchaser for 600 *l.*

Thereupon Mr. *Bridges* arrested Sir *Charles* upon his Bond, and he was in Prison in the *Fleet*; and afterwards he, to procure his Enlargement, paid Mr. *Bridges* 600 *l.* and there remained due to Mr. *Bridges* at the Time of his Assignment only 643 for Principal, Interest and Costs; and yet the Assignment is made in Consideration of 1000 *l.* mentioned to be paid to him, and he accordingly had a Bill for 1000 *l.* upon Sir *John Johnson*, the Goldsmith delivered to him, which was a Fraud in him, and he concealed all these Matters from Mr. *Christy*, and assigned this as a good Security.

'Twas urged, that this was a Fraud, and the Reasons insisted upon and proved by the Plaintiff for Relief against the Defendant *Bridges*, were, that he, after the Security assigned to him, had joined with the Mortgagor in selling Part of the mortgaged Premisses, which (as was alledged) was the best Part of the Security; and at the Time when he assigned the Security to the Plaintiff, knew it to be bad, and therefore he ought to take back the Security, and answer the Money.

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As against Mr. *Christy* it was alledged, that he by receiving the Plaintiff's 1000*l.* became Debtor to her for so much; and his putting of it out on this Security, without so much as acquainting her or her Friends, or advising with her Council, could not discharge him of the Demand she had against him for the said 1000*l.* that if he were not guilty of a Fraud in that Matter, yet he was guilty of a gross Neglect, not to enquire into the Circumstances of Sir *Charles*, who then owed 10,000*l.* upon Statutes, Judgments, *&c.* which might have been found out if inquired after; that he himself was so satisfied of his Faultiness in the Case, that he had declared he thought himself obliged in Conscience to make her Satisfaction, and that he would do so (as was fully proved in the Cause) and *volenti non fit injuria*, and he had left a great Estate, and no Debts or Children, and had by his Will only left the Plaintiff an Annuity of 20*l.* *per Ann.* to commence after the Death of his Wife.

'Twas answered on Behalf of Mr. *Bridges*, that as for the Assignment being made in Consideration of 1000*l.* paid to him, whereas so much was not due to him, it was so done by the Desire of Sir *Charles Bickerstaff*; and tho' the Bill for the whole 1000*l.* was made payable to him, yet he had only received so much as was due to him, and Sir *Charles* had the rest; that he having been deceived in the Mortgage, and taken an ill Security, might justly get rid of it as he could, and had Obligation to discover the Badness of the Security, which would have prevented his ever parting with it; therefore he having been guilty of no Fraud, there was no Reason to charge him with any Part of the Money, or to force him to take back the Security.

'Twas said for Mr. *Christy*, that there was no Fraud in him, that he had received and put out the Money at the Plaintiff's Desire; that he had transacted the Security merely out of Friendship to her, and without any Reward from any Body, and ought not to be answerable for the Misfortune, and that to charge

him would be to destroy all Commerce in Relation to Securities; for no one would venture to put another's Money upon a Security, if he were obliged to warrant and make it good, in Case a Loss should happen, without any Fraud in him; that tho' the Plaintiff had not been acquainted with this Security before hand, yet she had given him Directions in general to put out the Money, and approved it after by taking the Deeds, and receiving the Interest, and had petitioned the House of Commons against Mr. *Phillip Bickerstaff*, who was a Member of that House, and bound with his Brother Sir *Charles* in the Bond for Performance of Covenants; that what he said of thinking himself bound in Conscience to make her Satisfaction, were only Expressions of great Concern for the Plaintiff's Misfortune, but could not in any Court of Law or Equity oblige him to make her any Reparation, who had done her no Wrong; nor did she set up any such Pretence during his Life-time, tho' he lived five Years after the Money lent; and he had by his Will given 20 *l. per Ann.* after the Death of his Wife, and several other considerable Legacies to the Family, which he had no Obligation to have done.

My Lord *Keeper* said, he did not think that either Mr. *Christy* or Mr. *Bridges* had done altogether what in natural Justice they ought to have done, yet that there was no sufficient Foundation to charge either of them in Equity. He cited the Case of Sir *John Foach* the Scrivener, upon the Mortgage of Mr. *Jervis*, where, tho' Sir *John* had Notice of Declarations in Ejectment, delivered on a Prior Mortgage, before he lent his Client's Money, yet could not be charged to make good to his Client the Money he afterwards lent upon it, so he dismiss'd the Bill without Costs; and this Decree was afterwards affirmed in the House of Lords.

Case 127.

Clark versus Ward.

Fine fraudulently obtained, and Razures in several Parts of it to make it correspond throughout, a Crime in the Officers who did it, but no Cause for setting aside the Fine, or for a Reconveyance of the Estate in Equity, and the Examination proper only in the Court where the Fine was levied.

THE Defendant *Ward* had inveigled his Wife to levy a Fine of her Land to him when she lay on her Death Bed, pretending that he was thereby only to have it for his Life; and a *Dedimus* was sent into the Country to take the Fine, and the *Caption* was taken about 100 Miles from *London*, the very Day she died; and therefore, because the Fine could not have stood, the Party being dead before the *King's Silver* was paid, the Writ of Covenant was razed in the *Teste*, and made to bear Date 10 Days backward; and all other Parts of the Fine were razed likewise, and made to correspond with it; and the *King's Silver* was paid, and so all appeared upon the Record to have been done before the Death of the Woman.

This Bill was brought by her Heir at Law, to set aside this Fine as obtained by Fraud, or to have a Reconveyance of the Land; and it was admitted by the Defendant's Council, that a Fine obtained by Fraud, might be set aside as well as any other Conveyance; but to bring such Matter to be examined here for Irregularity, or on Pretence of Razures or Alterations, they said was without Precedent. If a Judgment had been irregularly entred or obtained at Law, that must be set aside in the Court where it was obtained, or not at all, and cannot be done by Examination here, being wholly foreign from the Jurisdiction of this Court, and of dangerous Consequence: And if such Examination could have been proper at Law (which it cou'd not) it must have been only against the Officer of the Court, and that ought to have been by Petition; and if the Matter were proper for Relief, it ought to have been made out by Proofs before the Hearing, and cannot be done by farther Proofs after Publication.

On the other Side it was said, This Examination into the Parts of the Fine is only to shew the Fraud in obtaining it, and can be only obtained here, for 'tis concerning Parts of the Fine which are only here in this Court, and may be made out after Publication, for 'tis only inspecting the Force of the Records; and tho' the Fine stand good, yet the Uses may be set aside; as if Trustees levy a Fine to one without Consideration, the Court will not set aside the Fine, but order a Re-conveyance of the Land.

Lord *Keeper.* There is a great deal of Difference between the Irregularity of passing the Fine, and the undue and fraudulent Manner of obtaining it; for which he cited *Greenwood*'s Case, and *Hungate*'s Case, 5 *Co.* 2 *Vent.* 30. and said, if a fraudulent obtaining a Fine could have been relieved against here, it would have been attempted in some of those Cases; and if it should be examinable here, it wou'd be a great Weakning of Fines, and can only be examined here to punish the Party that did it *Criminaliter*; in *Gellibrand*'s Case, where one was personated, yet the Fine was not set aside, but a Re-conveyance ordered; afterwards the Bill was dismiss'd.

Wray versus *Williams*.

Case 128.

A Guardian suffered a Dowress to recover at Law, by not setting up a Term, which was created for protecting a Purchasor, and the Infant was relieved.

A Term was raised in *Black-acre* in Trust, to indemnify Mr. *Buckley* against Incumbrances that might affect *White-acre*, which he had purchased; the Defendant *Williams* brought a Writ of Dower of *Black-acre* against the Plaintiff who was an Infant, and his Guardian had let her take Judgment at Law, without setting up the Term, or taking any Notice of it; so this Bill was brought by the Infant Heir to be relieved against that Judgment.

'Twas said by the Court, that this Case is the same with my Lady *Radnor*'s, and if she could not be relieved as Plaintiff, it must be for Want of Equity, and therefore the

the Plaintiff must be reliev'd against her when she is Defendant; I do not see any Difference in Reason betwixt a Tenant by the Courtesy, and a Tenant in Dower; but one has been adjudg'd one Way, and the other another. And my Lady *Radnor*'s Case having been affirmed in the House of Peers, the Authority is so great, that I cannot get over it; and it has been always admitted, that an unsatisfied Mortgage shall not stand in a Dowresses Way, but that she may redeem; but this is not a Mortgage, but a Term to indemnify a Purchaser, and it must continue so; and subject to that, it must be in Trust for the Heir.

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De Termino Paschæ, 1701.

In Curia Cancellariæ.

Brown versus *Bradshaw*, & al'. Case 129.

An *Extent* in *Aid* is taken out by the King's Receiver against his own Debtor, against whom a Commission of Bankruptcy was before awarded; and the Assignees under the Commission brought their Bill in Chancery to set aside the *Extent* in *Aid*; and after 15 Years Pendency of the Suit, at the Hearing, the Bill was dismiss'd, for that the Court of Chancery had no Jurisdiction in Cases of this Nature, which were only proper for the Exchequer, being the Court of the King's Revenue, and from which the *Extent* in *Aid* issued, and therefore only examinable there; and if set aside here, yet the Exchequer might carry on the Process, till the Debt cleared, according to the Course of the Court.

MR. *Kingdom* (amongst other things) was *Farmer* of the *Hearth-Money* under the Crown, and his Accounts not liquidated in the Exchequer; and there were Accounts depending between Mr. *Kingdom* and Mr. *Hind* a Goldsmith, who became a Bankrupt; and after his Bankruptcy, but before any Assignment made by the Commissioners, an *Extent* in *Aid* was taken out in the Name of *Kingdom* against *Hind*, and all his Estate both Real and Personal was seised by Virtue thereof.

The Plaintiffs who were Assignees of *Hind*'s Bankruptcy, brought this Bill to be relieved against the said Extent.

Answers were put in, and many Proceedings had in the Cause, so that it had depended 14 or 15 Years; and now at the Hearing, the Defendants insisted, that this Court had no Jurisdiction in this Cause, for it being a Matter relating to the King's Revenue, ought to be controverted in the Court of Exchequer (where there is

a Court of Equity for ſuch Matters) and not in this Court.

For the Plaintiffs it was inſiſted, that this was really the Cauſe of the Defendants, and not the King's; that the Farmers of the *Hearth-Money* are not in Truth indebted to the King, at leaſt there is no liquidated Debt, and that in Reality the Farmers of the Hearth-Money are indebted to *Hind*, inſtead of his being indebted to them; that there are many Precedents where *Extents* of this Kind have been controverted in this Court, as *Caſſel* verſus *Brewer*, in my Lord *Jeffery*'s Time; *Cholmley* verſus *Sturt* in the Time of the late Commiſſioners, where the Defendant who was a Creditor by ſimple Contract of a Perſon deceaſed, had preferred himſelf by ſuch Extent before other Creditors of a higher Nature, and he was decreed in this Court to refund; that this is in Nature of a Commiſſion of Bankruptcy which iſſues out of this Court, and therefore will give this Court Juriſdiction, tho' it had it not otherwiſe; and if the Court of Exchequer has a Juriſdiction in ſuch Caſes, ſure this Court has at leaſt a concurrent Juriſdiction with it; and if it had not a Juriſdiction, the Defendant ought to have taken Advantage of it by Exception or Demurrer, but ought not to be permitted to do it now after fifteen Years Pendency of the Cauſe.

The Attorney General ſaid there is in this Cauſe an original Extent for the King, as well as this *Extent* in *Aid*; and 'till it appears the King's Debt is ſatisfied, according to the Courſe of the Exchequer, this Court will not ſet aſide the ſaid *Extents*: And 'tis not material that the King's Account is not liquidated, for 'till this, they are Debtors for the whole, and the Irregularity of the Extent ought to be controverted only in the *Exchequer*, from whence the Extents iſſue, and not here; and the Court of Exchequer is as ample a Court of Equity as this; and the King muſt proceed in the Court of Exchequer.

If this Court should hold Plea in such Cases, the Consequence will be, that the Account of all the King's Debts may be drawn hither, for nothing can be done in this Matter 'till the Account be taken; and if that were taken here, yet the King won't be concluded by it in the *Exchequer*, for 'till the Account be discharged there, he may take out Process there; and 'tis the Plaintiff's own Fault that he has travelled so long out of the Way, for he was told of it at first; the Commissioners have no other Right than the Bankrupt himself had; and therefore if he could not have come hither, no more can they; and the Court of Exchequer was first possessed of the Cause by the *Extents*, and they have as supreme Jurisdiction in the King's Causes, and do often grant prerogative Orders to remove Causes out of other Courts, where the Consequence would be to have their Proceedings examined elsewhere.

As to the Case of *Capel* versus *Brewer*, the Defendant there confessed there was no Debt, and that he was able to pay the King's Debt without Aid; and there the Bill was only against the Party that had preferred himself, and his Simple Contract Debt, and the Decree was only against him to refund upon the Fraud, and did not meddle with the *Extent*; but here the Bill is to set aside the *Extent*, and there the King could have had no Benefit of the *Extent*, tho' they were *Extents* in *Aid*.

The Case of *Cholmey* versus *Sturt* is the same with the other Case, and differs from the present Case as the former did; and 'tis found by the Inquisition, that *Hynd* was indebted, and they ought to have traversed the Inquisition if they would have controverted that Matter.

My Lord *Keeper* after some Time taken to consider of it, dismiss'd the Bill; the Suggestions whereof he said were only that *Hynd* was not indebted to the *King*, or to the *Farmers*, nor they to the King; and that these Extents are only a Fraud to protect the Bankrupt; that these Matters were not proper before him, nor in his Power to examine into, being found and of Record in the

the Exchequer, that it wou'd be to the Prejudice of the King; for if these Extents should be set aside, the King would be deprived of the Money he is in Possession of by them; that as to any Pretence of Irregularity, that was examinable in the Exchequer only; that both the Precedents cited, are since this Bill was depending; that in the Case of Sir *Hugh Cassel* versus *Brewer*, the Defendant confessed that he had sufficient to pay the King, and that his Debt was not in Danger, and that he took out the Extent himself. *Cholmey* versus *Sturt* was a Fraud, and an Extent in Aid was never made Use of so far before. The Justice of the Nation is distributed into particular Courts, which I cannot confound.

Case 130. 2 Vern. 241. S. C.

City of London versus *Richmond*, *Adersey*, & al'.

Assignee of a Personal Contract for a Liberty of bringing Water to the City of *London*, chargeable in Equity with the Covenants in the Original Lease or Contract, as an equitable Assignee upon an equitable Privity of Estate, like the Assignee of a Bond.

Adersey for a certain Sum of Money had articled with the City, to lay a Pipe, which should not convey less than 19 Tun of Water an Hour to *Stocks Market* and *Cheapside*.

The Defendants and one *Houghton*, who was no Party to the Bill, and others, who were not brought to Hearing, being acquainted with those Articles between *Adersey* and the City, had determined with themselves to take a Lease of those Waters from the City, and before the Pipes laid, employed *Houghton* to treat with the City, and take a Lease of them to himself; but they had agreed among themselves, that there should be 900 Shares in that Lease, and that *Houghton* should have 300 Shares to himself, and the other 600 Shares were to be to the other Parties in other Proportions.

Houghton accordingly treated with the City in his own Name, and took a Lease of these Waters from them for 51 Years, at 2600*l.* Fine, and 700*l.* *per Ann.* Rent,

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during the Term; and *Houghton* covenants for himself and his Assigns to pay the Rent, and to do several other Matters.

By Indenture of the same Date with the Lease, and made between *Houghton* of the one Part, and four others (two of which were only brought to Hearing) of the other Part, *Houghton* assigns this Lease to those four Persons in Trust for himself, as to 300 Shares; and for their own Benefit as to 600 Shares, as had been agreed between them before taking the Lease.

Adersey lays the Pipe, but instead of carrying 19 Ton *per* Hour, it did not carry above 5 Ton *per* Hour, and the Lease proved a very hard Bargain, and *Houghton* fails.

The City brought this Bill against the Assignees of the Lease to pay the Rent in Arrear, and the growing Rent, and to perform the other Covenants in the Lease; and as against *Adersey* it was, that if *Houghton* had not fully performed his Articles with the City, he might do it, that the other Defendants might have the Benefit of them.

'Twas objected, that this being such an unreasonable and losing Bargain, ought not to be decreed in a Court of Equity, nor ought they to be charged further than they might at Law, or any more than an Assignee of all the Term, except a Week, &c. (who therefore would not be liable at Law to the Covenants in the Lease) should be obliged in this Court to perform them.

'Twas further urged, that there was neither Privity of Contract nor Estate between the Plaintiffs and Defendants, and the Lease is only a personal Contract for a Liberty of bringing Water, which the City enjoys under an Act of Parliament; and if the Defendants are chargeable at all here, yet they can be charged only to account for the Profits, and not to answer the whole Rent.

My Lord *Keeper* said here is an equal Privity of Estate, as in the Case of an Assignee of a Bond; and as to its being a bad Bargain, he thought that not material,

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for there is the ſame Reaſon that a bad Bargain, if fair, and without Fraud, ſhould be decreed, as if it had been a good one; and 'tis plain here was no Fraud nor Surprize in this Caſe, for the Indenture between *Houghton* and his Aſſignees bears Date the ſame Day with the Leaſe, and recites it, and what the Fine and Rent was, and then agrees to divide it into 900 Shares, &c. they ſhall be decreed to pay the Rent for the Time paſt; but I can make no Decree that they ſhall continue the Payment of it during the Term, for they are chargeable no longer than the Privity of Eſtate continues; and if they can aſſign it over, that Ground of the Charge is gone.

Caſe 131. *Blake* verſus Sir *Edward Hungerford.*

A. ſeiſed in Fee in Right of his Wife, joins in a Fine, and declares the Uſes to *B.* by Way of Mortgage, for ſecuring 15,000 *l.* and ſubject thereto to the Uſe of *A.* for Life; Remainder to the Wife in Fee; then *A.* acknowledges a Statute to *C.* for 500 *l.* then the Wife dies, and *A.* ſells his Eſtate for Life for 3000 *l.* to *D.* the Son and Heir at Law of the Wife, who had no Notice of the Statute; and the Mortgage is aſſigned to a third Perſon, who paid off the 15,000 *l.* and advanced the 3000 *l.* then *D.* acknowledges a Statute to *E.* who had no Notice of *C*'s Statute, makes his Will, and deviſes theſe Lands to *A.* and dies: As to the 3000 *l.* held clearly that ſhould be preferred to *C*'s Statute; held alſo that *E*'s Statute ſhould be preferred to *C*'s; becauſe the Mortgagee was but in Nature of Truſtee for the Son.

SIR *Edward Hungerford* ſeiſed in Right of his Wife of the Manor of *D.* procures her to join with him in a Fine by Way of Mortgage in Fee for ſecuring 15000 *l.* and the Equity of Redemption thereof upon Payment of the Money is limited to Sir *Edward* for Life, without Impeachment of Waſte, Remainder to the Wife, and her Heirs and Aſſigns.

Sir *Edward* afterwards acknowledges a Statute of 500 *l.* to *George Arnold*, to whom Sir *Jeremy Sambrook* is Adminiſtrator; then the Wife dies, and *Anthony Hungerford* was her Son and Heir. Sir *Edward Hungerford* contracted with *Anthony* his Son, who had no Notice of the Statute, to ſell him his Eſtate for Life in the Manor for 3000 *l.* and accordingly *Anthony* procures 3000 *l.* more to be taken up upon the Mortgage, and the Mortgage to be transferred to the new Mortgagee, who paid off the old ones, and furniſhed the 3000 *l.* to Sir *Edward Hun-*

gerford, and the Equity of Redemption is limited to *Anthony*, and he Covenants to pay the Money; and the Mortgagee's Covenant on Payment of the Money to assign to him, or as he shall direct.

Then *Anthony* acknowledges a Statute to one *Mellish* (who had no Notice of the 500 *l.* Statute) and after makes his Will, and devises Legacies to the Plaintiffs, and chargeth them on the said Manor, and deviseth the Manor itself to Sir *Edward Hungerford* and his Heirs, and the great Question was, Whether *Sambrook*, who had the Interest of the Statute acknowledged by Sir *Edward*, whilst he was Tenant for Life, or *Mellish*, who was *Conuzee* of *Anthony*, after his Purchase of Sir *Edward*'s Estate for Life, should be preferred in Payment.

The Master of the *Rolls* decreed, that Sir *Jeremy Sambrook*'s Statute must come in after the Creditors and Legatees of Sir *Anthony Hungerford*; and that *Mellish* must come in immediately after *Anthony*'s Legacies, by Virtue of *Mellish*'s Statute, *Mellish* having joined in the Declation of Trust; and this Decree was affirmed by my Lord *Keeper*, with the Assistance of Mr. Justice *Blencow* and Lord Chief Justice *Trevor*.

The Reasons urged for it were, that tho' neither had the legal Estate, and that between two Equities *qui Prior est tempore Potior est Jure*; yet that must be understood of bare Equities; but in this Case *Anthony Hungerford* had more than a bare Equity, that the Case of *Smith* and *Christ's Hospital* did not come up to this Case, for there was a Term standing out, to which neither Party had a right; but by *Anthony*'s Purchase the whole Interest is united in him, and they who had the legal Interest covenanted to assign to him, and are but his Trustees after Payment of the Mortgage Money, and it differs little from the common Case, where a third Mortgagee buys in the first Mortgage in Trust for himself, and *Anthony* may make Use of his Trustee's Name at Law, either to defend or recover, and may have an Action at Law against them to assign.

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That tho' Sir *Edward's* Equity for Life would have intitled him, on Payment of a third Part, to redeem, and the 500 *l.* Statute was a Charge upon that Equity; yet that is liable to be defeated by a subsequent Incumbrancer without Notice; but such Purchasor must not be a Purchasor of a bare Equity only, for then the first will prevail; but *Anthony* is a Purchasor of Sir *Edward's* Equity, and the legal Estate together, and will have the Protection of the legal Estate.

His Deed of Purchase takes Notice of the Case, and that the Mortgage is assigned at his Instance and by his Procurement, and so he purchases the Benefit of the legal Estate, together with the Equity.

If a third Mortgagee takes only an Agreement of the first Mortgagee to convey to him, the second cannot in such Case compel him to assign to him, because such Agreement was no more than what they might have done without any Agreement; and in this Case *Anthony* is not intitled upon the old Equity of Sir *Edward*, but on the new Equity raised on the new Mortgage; and he is an absolute Purchasor of the Estate subject to the Mortgage, and must have the Protection of it; and to decree a Conveyance to Sir *Jeremy Sambrook*, would be to decree a Breach of a fair and lawful Covenant and Agreement.

Case 132.

Jory versus *Cox*.

A Mortgagee lends Money at 6 *l.* *per Cent.* and in the Deed agrees to take 5 *l.* *per Cent.* if it be paid within three Months after it became due; if the Mortgagee fail to pay at the precise Time, he must afterwards pay 6 *l.* *per Cent.*

A Mortgagee lends Money at 6 *l.* *per Cent.* but agrees in the Deed, that if the Money were paid within three Months after it became due, that he will accept of 5 *l.* *per Cent.*

The Mortgagor did not pay the Money within the three Months after it became due; and the Question was, Whether he should pay 5 *l.* or 6 *l.* *per Cent.*

The Lord *Keeper* having taken Time to consider of the Case, delivered his Opinion, That Interest must be paid at 6 *l. per Cent.* for tho' this Court relieves against unreasonable Penalties, yet this is not so, for the Mortgagee might have refused to lend his Money under 6 *l. per Cent.* if he had accepted 5 *l. per Cent.* that might have altered the Case, for there he had been his own *Chancellor*; and if it were to be so, that he must take 5 *l. per Cent.* yet he ought at least to have Interest for the Interest from the Time it ought to have been paid, for else I take from him his legal Advantage, without making him the Recompence which in Conscience he ought to have, and so there is some Difference between reserving simply 5 *l. per Cent.* and reserving of it, as in this Case. I cannot set aside a Man's Agreement, he must pay 6 *l. per Cent.*

Note, In this Case was cited a Case between Lord *Hallifax* and *Higgins*, where in such Case, 5 *l. per Cent.* only was allowed; but there the Agreement to take 5 *l. per Cent.* was by a distinct Deed, *Quere*, how that varies it.

Jolliff versus *Crew*.

Case 133.

A Legacy payable at a certain Time, shall notwithstanding carry Interest only from the Time it is demanded.

PER Lord *Keeper*. Tho' a Legacy be devised to be paid at a certain Time, yet it shall not carry Interest, but from a Demand made; otherwise of a Debt; and cited *Robinson* versus *Holmes* in *C. B.* where Lands being devised, upon Condition to pay such a Sum of Money at a certain Day, the Non-payment at the Day was adjudged no Breach, without a Demand and Refusal.

Case 134.
2 Vern. 425.
S. C.

Randall versus *Bookey*.

Lands are devised to Trustees to sell, and out of the Money arising by the Sale, among other Sums, to pay to his Heir at Law 100 *l.* and no Disposition is made by the Testator of the Surplus of his Estate, the Land shall not be turned into Personal Estate, nor more sold than is necessary to pay the Legacies, and the Heir shall have the Surplus.

A Man made his Will, and thereby devised Lands to Trustees, and their Heirs, upon Trust, that they shall permit his Wife to receive the Profits during her Life, and after her Death, shall sell the Lands, and out of the Money arising by such Sale, shall pay 150 *l.* to *J. S.* and 100 *l.* to the Plaintiff *Randall* (who was the Testator's Heirs) and devises one Moiety of a *Tally*, which he had upon some of the Publick Funds, to *B.* and the other Moiety to his Wife, and makes her Executrix, and dies.

The Questions were, what should become of the Surplus of the Money that should be raised by Sale of the Lands, whether it should go to the Wife, who was Executrix, or whether it should be a Trust for the Plaintiff, who was Heir at Law, or whether the Testator should be looked upon to die Intestate as to that, and the Surplus go, according to the Statute of Distributions, to the Defendant.

'Twas said, that here being a particular Sum devised to the Heir out of the Land devised to be sold, it should exclude him from any more out of these Lands, as a particular Legacy does exclude an Executor from the Surplus by the Construction of this Court, that these Legacies must come out of these Lands, for it is so expressly directed, and that is not to be sold during the Wife's Life, so no immediate Legacy is intended; that this differs from all the former Cases, for there Legacies have been given for Care and Pains, which imports they are only Trustees; but here 'tis so expressed, and the particular Legacy of the *Tally* comes in only, because, when he gives away one Moiety, 'twas natural he should dispose of the rest; and they would have read Witnesses to explain the Testator's Meaning to be so; but that the Court would not admit.

The

The Lord *Keeper* decreed, an Account to be taken of the Personal Estate; and that to be distributed according to the former Resolutions, there being a particular Legacy given the Executor; but as to the Surplus of the Money to be raised by Sale of the Land, he said, that devise was but in Nature of a Mortgage or Security; and that the Plaintiff paying those Legacies must have the Land, tho' he had a particular Legacy thereout, as he would have had all, if it had not been devised away, as if a Man devises Lands to his Heir for Life; yet he shall have the Reversion too.

Heron versus *Heron*.

Case 125.

NIcholas Heron, made Sir *Nicholas Heron* and others his Executors in Trust, and died, Sir *Nicholas* managed the Personal Estate, and kept on the Ledger and Journal of *Nicholas*, and from Time to Time made all the Entries in his own Hand; and therein enter'd the Personal Estate Debtor to Lands bought, naming them particularly, and dies, having made Sir *Nathan Heron* and Sir *Joseph Heron* his Executors: The only Question was, Whether these purchased Lands should be a Trust for those who were to have the Benefit of Sir *Nicholas*'s Personal Estate? 'Twas decreed they should not; and my Lord *Keeper* said, this was not so strong a Case, as *Kirk* versus *Webb*; for there was a Defect of Personal Estate to answer the Demand, which in this Case there is not.

Hamell versus *Hunt*.

Case 126.

One assigns a Term to Trustees in Trust to permit himself to receive the Profits during his Life, and after his Death in Trust to permit his two Daughters *B.* and *C.* their Executors and Administrators, to receive the Profits during the Residue of the Term, equally to be divided between them, they paying so much within two Years to his other two Daughters. *B.* dies, *C.* Mortgages to *D.* held that *B.* and *C.* were Tenants in Common, and not Jointenants by the Intention of the Father, which was to make distinct Provisions for them.

A Man Assigns a Term to Trustees in Trust, to permit himself to receive the Profits thereof during his Life, and after his Death, in Trust, to permit his

two Daughters *B.* and *C.* their Executors and Administrators, to receive the Profits during the Residue of the Term, equally to be divided between them, they paying so much within two Years to his two other Daughters.

B. dies, *C.* Mortgages to *D.* and the only Doubt was, Whether these two Sisters were Jointenants, or Tenants in common.

The Master of the *Rolls* held, that this being a Trust of a Personal Thing, they were Tenants in Common; and that the Father's Intention appears so in the Consideration, which was, to make several, and distinct Provisions for his two Daughters, and the paying of the Sums appointed to their two Sisters, makes them Purchasors.

DE

Term. S. Trinitatis, 1701.

In CURIA CANCELLARIÆ.

Stribblehill verſus *Brett*.

Caſe 137.
2 Ven. 445. S. C.
Parl. Caſes. 76. S. C.
A Leaſe made by Tenant for Life Purſuant to his Power, but for a Marriage Brokage, and ſo an unlawful Conſideration; decreed after his Death to be ſet aſide, and to be no Truſt for his Executors, as it was urged it ſhould, the Conſideration being as none.

MR. *Thomas Thynn* of *Long-Leet*, was ſeiſed for Life of the Rectory impropriate of *Thame* in *Com. Oxon.* and ſeveral other Lands, with Power to make Leaſes Remainder to his firſt, and other Sons, Remainder to the Lord Viſcount *Weymouth*. Mr. *Thomas Thynn* demiſed this Rectory for 99 Years, if three Lives lived ſo long in Truſt for Mr. *Thomas Thynn* of *Egham*, and died *Anno* 1681; and ſoon after his Death, the Lord *Weymouth* made another Leaſe of the ſame Rectory in Truſt for the ſame Mr. *Thynn* of *Egham*, who wanting Money, borrowed 2000 *l.* of the Plaintiff's Inteſtate, and theſe two Leaſes were mortgaged to him for ſecuring of it, and then he died Inteſtate; and the Plaintiff took out Adminiſtration to him, and Mr. *Thynn* of *Egham* died much indebted, and his Wife, (who was a Defendant) was his Adminiſtratrix, the Lives mentioned in the firſt Leaſe died, and thereby that Leaſe expired.

In Avoidance of the Plaintiff's Title under the Leaſe made by my Lord *Weymouth*, the Defendants, the *Bretts*, ſet up a Title under a Leaſe, purporting to be made by

Mr. *Thomas Thynn* of L[illegible]Leat in 1681, a little before his Death, to their Uncle Major *Brett*, for the Consideration of 3600 *l.* and that their Uncle had before his Death made a voluntary Assignment of it to them.

The Plaintiffs said, that tho' this Lease imported to be made for 3600 *l.* yet no Money was ever really paid; and that, if the Lease were really made, it was upon a Marriage Brokage for Major *Brett*'s procuring a Marriage between Mr. *Thynn* and Lady *Ogle*, and the Proof seemed to be pretty strong for that Purpose.

The Defendants objected two Things, 1st, That the Plaintiff had not made any sufficient Proof, that the Lease was made on any such Consideration as they pretended; and it could not be expected, that after such a length of Time as 20 Years, Proof should be made of the Payment of the Consideration Money, especially by the Defendants, who were Assignees and Strangers; and that if the Consideration were not paid, then the Lease must at most be in Equity, but a Trust for Mr. *Thynn*, and Consequently for his Executors, and they were not Parties to the Suit.

2*dly*, That the Plaintiff is not entitled to controvert this Lease, for he does not claim under or in Privity to Mr. *Thynn* that made the Lease, and was but Tenant for Life, and (whose Executor must be intitled to the Benefit of this Lease, if it be a Trust) but under the Lord *Weymouth*, who is a Remainder-Man.

'Twas answered, That the Plaintiff's Proofs were sufficient, and that a feigned Consideration was worse than no Consideration; for in the latter Case it may be intended a voluntary Gift, and the fancy of its being a Trust is idle, 'tis a Lease ill obtained, and the Decree must have been, not that it should be a Trust for Mr. *Thynn*, but that it should be set aside, and then my Lord *Weymouth* would have had the Benefit of it, and so must his Grantee.

Lord *Keeper*. If it be a Lease for a Marriage Brokage, it must be set aside, being *ex turpi causa*, and no Difference

ference between a Bond, or [illegible] and an Inheritance; but I think the Proof is not [illegible] enough to found a Decree upon, therefore let it be try'd at Law, Whether the procuring the Marriage were the Consideration of this Lease.

Afterwards it was twice try'd at Law, and two Verdicts for the Defendant, and thereupon the Bill was dismiss'd; but upon Appeal to the Lords, they revised the Decree, and set aside the Lease without regard to the Verdicts.

David Phillips versus *Eliz. Phillips.*

Case 138

AFTER hearing of this Cause, my Lord *Keeper* ordered a Case to be stated, and sent to the Justices of the *Common Pleas* for their Opinion, which was done accordingly, and the Case with their Certificate was as follows:

That *William Phillips* by his last Will and Testament in Writing did dispose of his Estate in these Words, *viz.* I give, devise, and bequeath all my Houses, Lands, Tenements, and Hereditaments, with their Appurtenances lying in the several Counties of *Denbigh* and *Flint*, or elsewhere in the Kingdom of *England*, to my well-beloved Friends *Samuel Powel* and *Roger Tennings*, and their Heirs in Trust; and to the Intent, that the Profits thereof shall be equally divided between *Elizabeth* my Wife, and my Daughter *Martha Phillips*, for and during the natural Life of the said *Elizabeth*, and after her Death, I give and devise the said Houses, Lands, *&c.* to my said Trustees and their Heirs, to the Use of the said *Martha*, and the Heirs of her Body for ever, with several Remainders over, and dies, and *Elizabeth* his Wife is still Living.

One devises Lands to Trustees, and their Heirs in Trust, that the Profits shall be equally divided between *Elizabeth* my Wife, and *Martha* my Daughter and Heir of the Testator, during the natural Life of the said *Elizabeth*, and after her Death, I give and devise the Lands to my said Trustees and their Heirs, to the Use of the said *Martha*, and the Heirs of her Body, with several Remainders over, and dies. *Martha* dies without Issue, and *Elizabeth* is still living. By the Opinion of all the Justices of *C. B. Elizabeth* and *Martha* were but Tenants in Common, and *Elizabeth* shall have the Moiety of the Profits during her Life, and the other Moiety by the Statute of *Frauds* and *Perjuries* belongs to the Executors or Administrators of *Martha* as before that Statute it would have belonged to the Heir of *Martha*, and of the Testator, as Profits undispos'd of and resulting to him.

The

The sole Question was, Whether *Elizabeth* on the Death of *Martha* without Issue, ought by Survivorship, Implication of Law, or otherwise, to have the whole Profits during Life, or only one Moiety thereof, and the Plaintiff the other during *Elizabeth*'s Life, as Heir at Law to the said *William* and *Martha*, as Profits undisposed of, and resulting to him; and by Certificate of all the Judges of *C. B.* on hearing Council, *Elizabeth* and *Martha* being Tenants in Common, during the Life of *Elizabeth*; at *Martha*'s Death her Moiety belongs to her Executor or Administrator, by the Statute of *Frauds* and *Perjuries* subscribed by all the four Judges.

Note, There had been a Decree for the now Defendant then Plaintiff to have the whole during Life, taking that to be the plain Intent of the Testator; and that Decree was signed and inrolled, the then Defendant, now Plaintiff, did not in that Case insist upon any Title as Heir; and therefore brought this Bill upon that Title, and conceiving himself to be intitled to a Moiety during the Life of *Elizabeth*, as an undisposed Interest, she having but a Moiety given her.

Case 139. *Halcott* versus *Markant.*

An Executor by the very Will impowered to Purchase Lands for the Heir; yet the Purchase being in his own Name, and he dead Insolvent, as to the other Assets the Heir could not follow the Land to make it a Trust for him, tho' the Executor had told the Mother of the Purchase he was about to make, and had her Consent; and so the Executor's Heirs went away with the Land for want of Express Proof of the Application of the Trust Money.

THE Plaintiff's late Father left the Plaintiff, his Son and Heir, a young Infant, and by his Will made the Defendant's late Husband and others his Executors, and Guardians and Trustees for the Plaintiff, and impowered them, if they thought fit, to lay out the Personal Estate in Land, and cause it to be settled on the Plaintiff and his Heirs.

Markant, (who was the sole, or at least the principal acting Trustee) being about to sell part of the Personal Estate of the Testator, told the Plaintiff's Mother of it, and that he should have Money in his Hands, and was about

about buying an Estate, call'd *Gressing-Hall*, for the Plaintiff the Infant, and asked her Consent, which she gave, and so it was proved in the Cause; and afterwards he bought that Estate, but took a Conveyance in his own Name, and no Trust in Writing ever declared for the Plaintiff; but 'twas proved in the Cause, that he had several Times declared, that it must be sold to make the Plaintiff Satisfaction, and afterwards he died Intestate and Insolvent.

The Question was, Whether his Heir should have the Land, or whether it should be in Trust for the Plaintiff, or be sold to make him Satisfaction.

The Master of the *Rolls* was very inclinable to help the Plaintiff as far as might be, and said, he thought the Case of *Kirk* versus *Webb* did not govern this Case; for there the Party did not know himself to be a Trustee, and had disposed of the Lands; he cited the Case of *Meers* versus St. *John*, and 4 *Inst.* Title *Court of Chancery*, and said, here is a good Foundation for a Trust, for here is a Commencement of a Trust by the Will in Writing, and *Markam* had declared, that *Gressing-Hall* must go to satisfy the Infant, and why then should not the Lands in the Hands of his Heir stand charged to make good what the Personal Estate falls short, and perhaps this may be a resulting Trust, and decreed an Account of the Personal Estate.

But afterwards dismiss'd the Bill, as to the *Gressing-Hall* Estate, and said, it was too hard for him, because there was no express Proof of the Application of the Trust Money.

Vachell versus *Jeffereys*.

Case 140.

A. devises to *B.* and *C.* his Wife's Children (as he called them, not owning them to be his) 10 s. a-piece, and no more, and gave the Children that he owned considerable Legacies, *B.* and *C.* shall come in for a Share of the undisposed Surplus, for the Words of Exclusion must be taken strictly.

MR. *Bretton* had two Children by his Wife, and afterwards he grew into a dislike of her, and parted with her, and she had two Children more, which he

never would own to be his [illegible] married his eldest Daughter, and gave her a considerable Portion, and afterwards made his Will, and gave to the two Children which he owned considerable Legacies, and then devises in this Manner, *Item*, I will, that my Executors shall pay to *A*. and *B*. the Children of my Wife 10 *s*. a-piece, and no more. Then he devised Legacies to his Executors, but did not mention them to be for their Care and Pains, or any Thing to that Purpose.

The 1st Question was, Whether the Executors should have the Surplus of the Estate, and it was decreed, that they should not, but that it must be distributed according to the former Resolutions.

2dly, Whether these two Children, which the Testator did not own, should come in for a Share; and it was decreed, that they should, for the Words of Exclusion are not plainly express'd; and shall be taken strictly in this Case.

Where a Person dies Intestate *quoad* a Surplus of his Personal Estate, a Daughter advanced by him in Marriage need not bring the Portion into *Hotch-potch* to intitle her to a Distribution Share.

3dly, Whether the married Daughter's Portion should be brought into *Hotch-potch*; and it was decreed, that it should not, but she to have her Share with the rest, and the difference as to bringing into *Hotch-potch*, was said to be between Persons dying wholly Intestate, and dying Intestate *quoad* a Surplus.

Termino S. Mich.

1701.

In Curia Cancellariæ.

Case 141.

Loyd versus *Cardy*.

A Solicitor's Bill being taxed and reported over paid 60*l.* the Client on Motion and Affidavit of his being about to go beyond Sea, had a *Ne exeat regnum*, tho' no Bill in Court whereon to ground this Writ.

THE Defendant in this Case being advised, he had paid one *Nailor*, who was his Solicitor in this Cause, more Money than could be due to him, obtained an Order to have his Bills referred and taxed, which was done; and upon the Taxation he was reported to be overpaid 60*l.*

Thereupon he moved the Court for a *ne exeat Regnum* against *Naylor*, on Affidavit that he was going beyond Sea with my Lord *Cornbury*, the Governor of *Jamaica*; and the Writ was granted by the Master of the *Rolls* in the Absence of my Lord *Keeper*, tho' there was no Bill in Court whereon to ground this Writ.

Case 142.
2 Vern. 440. S. C.

Kinder versus *Miller*.

A. dies intestate, leaving a Wife and two Daughters; after his Death 500*l.* is found in the House; the Widow lays out this Money in Lands, and settles it to the Use of herself for Life, Remainder to her own right Heirs; after the Death of the Mother and two Daughters, Plaintiff as Administrator to the Daughters, brings a Bill against the Heir at Law, to have two Thirds of the 500*l.* out of the Land as Personal Estate, which was decreed accordingly by the Master of the *Rolls*, but reversed by my Lord *Keeper*.

J. S. died intestate, leaving a Wife and two Daughters, Infants, and they became intitled to his Personal Estate in Thirds, which amounted to 900*l.* The Widow takes

takes out Administration, and within two Months after laid out 500 *l.* (Part of the Money left by the Intestate in his House at his Death, as was proved in the Cause,) in the Purchase of Lands, and the Conveyance was to herself and her Heirs; and there was no Declaration of any Trust in the Deed, nor was she so much as mentioned therein to be Administratrix to her Husband.

Afterwards she conveyed these Lands to Trustees, and their Heirs to the Use of herself for Life, and after as to one Moiety to the Use of one Daughter, and the Heirs of her Body; and as to the other Moiety to the other Daughter, and the Heirs of her Body, with cross Remainders, with Remainder of the whole to her own right Heirs.

The Daughters afterwards both married, and died, and the Mother died; the Husband of the surviving Daughter took out Administration to his Wife and her Sister, and brought this Bill against the Heir of the Mother to have this Land made Personal Estate, and to have two Thirds of it, as being purchased with the Money which belonged to the Daughters to whom he was Administrator.

The Defendants insisted on the Statute of Frauds and Perjuries, and that these Lands could not be subject to any Demands of the Plaintiff, there being no Declaration of Trust in Writing; and the Case of *Kirk* versus *Webb*, was cited and relied on.

The Master of the *Rolls* said that Case did not govern this, but stood on its own Bottom, and that here was an Interest vested in the Daughters by the Statute of Distributions, and said, it would be very mischievous to Infants, if their Money might be invested in Land, and that Land not liable to make them Satisfaction; and therefore he decreed that the Land should stand charged with two Thirds of the Purchase-Money for the Plaintiff, and if it were not paid, the Land to be sold; but this Decree was after reversed by my Lord Keeper *Wright*, as contrary to the Case of *Kirk* versus *Webb*.

Neal versus *Hanbury*.

Case 143.

John *Neal* by his Will devises 5 *l. per Ann.* to his Nephew *Thomas Neal* (without adding to his Executors or Administrators) to be paid half Yearly during the Life of his Wife, on Condition he behave himself civilly to her, for he was a very lewd dissolute Man, and made his Wife Executrix, and died; and she intermarried with the Defendant *Hanbury*.

A. devises to his Nephew 5 *l. per Ann.* (without saying to his Executors or Administrators) to be paid him during his the Testator's Wife's Life, whom he made Executrix, on Condition that he demeaned himself civilly to her. By his Death the 5 *l. per Ann.* is determined.

Thomas Neal the Devisee died, and his Wife the Plaintiff was his Administratrix, and brought this Bill *in forma pauperis*, to have the Payment of the 5 *l. per Ann.* during the Life of the Executrix of *John*.

But the Master of the *Rolls* said this is a Personal Bequest to *Thomas*; and 'tis upon Condition he demean himself civilly to the Executrix, which cannot be after he is dead, therefore I cannot make a new Will; the Bill must be dismiss'd.

Aplyn versus *Brewer*.

Case 144.

A Man made several Executors, who all joined in Sale of the Testator's Goods, but one only received the Money, and he afterwards became insolvent.

Executors who all join in a Sale, shall be all charged, tho' one only receives the Money: *Secus* of Trustees

Per Lord *Keeper*, all who acted by joining in the Sale shall be charged; yet lately before, in the Case of *Heaton* and *Marriot*, where a Person had made a Conveyance to several Trustees for Payment of Debts, and they all joined in the Sale, and one only received the Money, and became insolvent; the others were not charged.

Case 145.

Farr versus *Middleton.*

A Treats for a Purchase with *B.* and the Lands to be purchased were incumbred with Mortgages and Judgments; the Purchase-Money being agreed, was returned to *London*, and placed in an indifferent Hand to be paid in Discharge of those Incumbrances, when the *Quantum* of them should be adjudged, and Assignments made; but before that was done, the Purchasor died, and did not leave sufficient Assets to pay his Debts upon Bond.

The Question was, Whether the Money deposited as aforesaid, should be Assets of the Purchasor, and be applied to pay his Debts, or must be applied to pay off the Real Incumbrances on the purchased Estate; for if it were to be applied to pay off these Incumbrances, then the Creditors of the Purchasor must lose their Debts; but if otherwise, then the Mortgagees, &c. wou'd be paid out of the Land, by Virtue of their Securities, and the Creditors wou'd have their Satisfaction out of the Money, and so all might be paid.

My Lord *Keeper* was of Opinion, that the Money was bound by the Agreement, and must be applied to pay off the Incumbrances.

Case 146.

Jones versus *Basset.*

By the Infant's coming of Age, Administration *durante minori Ætate* ceases, and Suits by such Administrator is thereby determined, so that the Infant cannot go on therewith, but must begin anew, unless a Decree to account were had, in which Case the Infant on a Bill brought for that Purpose, may be allowed to go on therewith.

A Person who was Administrator *durante minori Ætate* of two Infants, and intitled to a Share of the Intestate's Estate in his own Right, brought a Bill for a Discovery and Account, and proceeded so far as to Examination of Witnesses, and then got his own Share, and let the Suit drop.

3 After

After the Infants coming of Age 'twas moved to have the Benefit of these Proceedings, and to carry on the Cause.

My Lord *Keeper* thought it reasonable if it could be done, that they might not be turned round to begin all anew, but thought the Suit quite dead, and at an End by the Infants coming of Age, whereby the Administration *durante minori Ætate* determined, and asked the Barr if any such Thing had ever been done; it was answered that the like had been done once by my Lord *Chancellor Somers*, in the Case of *Davis* versus *Davis*, where an Administrator *durante minori Ætate* proceeded to a Decree and Account before the Master; and then the Infant coming of Age, and praying, it was allowed to go on, though much opposed; but here 'twould not be granted, for *Davis*'s Case had proceeded to a Decree; and tho' the Plaintiff there was Administrator *durante minori Ætate*, yet it was *cum Testamento annexo*, which by him made some Difference; and the Infant there had brought a Bill to have the Benefit of the said Proceedings, and offered to be bound by them.

Jaggard versus *Jaggard*, & al', & econt'.

Case 147. 6 *December*. *A.* before Marriage covenants to settle Lands, in Consideration of 2000*l.* Portion, on himself for Life; Remainder to their first and other Son in Tail; Remainder to the Daughters in Tail; Remainder to himself in Fee.

MR. *Jaggard* on his Marriage with Mr. *Sutton*'s Daughter, in Consideration of that Marriage, and 2000*l.* Portion, covenants to settle certain Houses particularly named in the Deed, and all other his Freehold Estate, to the Use of himself for Life for her Jointure, then to the first and other Sons of that Marriage in Tail Male; and for Want of such Issue to the Daughters in Tail Male, with Remainder to himself in Fee; and Fee, with a Power of Revocation reserved to the Wife's Father then beyond Sea. The Marriage is had, and a Daughter born, and the Husband being taken sick, devises 1500*l.* to his Daughter; and if his Wife (being *enseint*) should have a Posthumous Daughter, she to have 500*l.* of the 1500*l.* and if either died before 21, or Marriage, the Survivor to have the whole; and gave all his Lands to his Wife and her Heirs, and the Surplus of his Personal Estate, after Debts paid, to his Wife, her Executors, and makes his Wife Executrix: Then another Daughter is born, and the Husband dies without any Alteration of his Will, or any Settlement made. Decreed that a Settlement be made, with a Power of Revocation to the Father; and that Legacies be likewise paid the Children, the youngest Daughter being a Postumous Child, within the Intent of the Will.

and in the Deed was a Proviso that Mr. *Sutton* the Wife's Father should have Power by Deed, &c. to revoke all the Uses; he was a Merchant, and at that Time beyond Sea, where he lived a long Time.

The Marriage took Effect, and he had Issue a Daughter; and his Wife being again *enseint* with a Child, he was taken sick, and made his Will, and thereby devised 1500 *l.* to his Daughter; and if his Wife should have a Posthumous Daughter, she to have 500 *l.* of the 1500 *l.* and if either died before 21 or Marriage, the Survivor to have the whole; and gave all his Freehold Estate to his Wife, and her Heirs, and the Surplus of his Personal Estate, after Debts paid, to her, her Executors and Administrators; and if the Personal Estate was not sufficient to pay his Debts, the Real Estate to be charged with them, and makes his Wife Executrix, and hath another Daughter born; and then dies without any Alteration of his Will, and without making any Settlement pursuant to the Articles.

The Widow insisted, that no Settlement ought to be made; for that, if it had been made, her Father might revoke it, and so her Husband would then have it free, and have Power to devise it, and therefore she was well intitled to it by the Will; and that these Legacies should be intended to be devised in Satisfaction of the Settlement; and that it must be so intended, for that they had no other Real Estate but that which was covenanted to be settled, and that they must either accept them so, or not have them.

She likewise insisted, that the youngest Daughter being born in the Life-time of her Father, was not a Posthumous Child, and therefore not entitled to the 500 *l.* and the Childrens Bill was to have the Settlement made, and to have their Legacies.

They insisted, that as the Will did not mention those Legacies to be in Lieu of the Settlement, there was no Necessity to think he so intended, for he was to have the Reversion in Fee of the settled Lands, and that was

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ſufficient to ſatisfy the Words of the Will, and was valuable too, for if the Infants die before 21, ſhe will have it; or if they ſhould live to that Age, yet during the Mother's Life, they could not ſuffer a Recovery to barr it; beſides, they had no Proviſion during the Life of the Mother; and therefore 'twas reaſonably to be intended he meant theſe Legacies for that Purpoſe, for their better Advancement in Marriage; for by the Settlement they were only to have a Remainder in Tail, and the Huſband would have nothing, if his Wife died before ſhe could ſuffer a Recovery, which could not be during her Infancy, nor during the Life of her Mother.

This Cauſe was heard before my Lord Chancellor *Somers*, and as to the firſt Point, he declared, the youngeſt Daughter, tho' born in the Life of her Father, to be a Poſthumous Child within the Meaning of the Will, and well intitled to the 500 *l.*

But as to the other Point of the Settlement, he reſpited his Judgment, and directed a Letter to be wrote to Mr. *Hutton*, to know whether he would revoke the Settlement.

The Cauſe coming on this Day before the Lord Keeper *Wright*, upon the Point of the Settlement, he ſaid, he would not Decree the Legacies to be in Satisfaction of the Settlement; and therefore decreed an Account of the Perſonal Eſtate, and the Infants Legacies to be put out by the Maſter, ſubject to the Contingencies in the Will, and that the Settlement ſhould be made Purſuant to the Articles, and there was to be a Proviſion in it for Mr. *Hutton* to revoke, *&c.*

Case 148.

Halford versus *Byron.*

A. bound to *B.* in a Bond of 1000 *l.* for Payment of 500 *l.* after *A.* and *C.* as his Surety give a Bond to *B.* of 200 *l.* for Payment of 100 *l.* as a further Security for so much of the 500 *l.* Then *A.* Assigns a Judgment to *B.* of 500 *l.* towards farther Satisfaction of the Debt, and *B.* receives several Sums on this Jugment; and *A.* by the Consent of *B.* receives 30 *l.* also part of the Money secured on this Judgment, This shall not go in Exoneration of any Part of the Money secured by the 200 *l.* Bond, as it would do, if *B.* had actually received it, and lent it to *A.*

A. Was bound to *B.* in 1000*l.* for Payment of 480 *l.* afterwards *A.* being robbed of 495 Guineas, *B.* thought his Money in Danger, and pressed *A.* for it, who got *C.* his Brother-in-Law to be bound with him to *B.* in a 200 *l.* Bond, to pay 100 *l.* and Interest, as a farther Security for so much of the 480 *l.* Then *A.* brings an Action against the Hundred, and recovers 540 *l.* and assigns the Judgment to *B.* and *D.* (his own Attorney) towards Satisfaction of the Debt; and the Sheriff paid several Sums to *B.* and 80 *l.* Part of the Judgment was paid to *A.* by *B*'s Consent; and if this should be reckon'd as paid to *B.* at least so as to exonerate *C. pro tanto*, was the Question.

My Lord *Keeper* held, that it should not, because, that this Assignment of the Judgment, was but as a farther Security for the Money due on the 1000 *l.* Bond; and as the Obligee had got it, so he might release or discharge it, as he thought fit, and the Surety is not hurt by it; otherwise it would be, if the Money had been once actually paid to *B.* and after, lent again to *A.* so decreed an Account to be taken of what due on the 1000 *l.* Bond, and what due on the 200 *l.* Bond for Principal, Interest, and Costs, or so much less as remained due on the 1000 *l.* Bond, and the 200 *l.* Bond to be delivered up.

Bishop versus *Godfrey* & al', Executors of *John Swift*.

Case 149.

A Decree equal to a Judgment at Law.

AN Executor pays Bond Debts before Money, on a Decree against his Testator. *Per Cur.* clearly he shall not be allowed those Payments in his Account, because the Decree here is equal to a Judgment at Law.

Hopton versus *Dryden*.

Case 150.

Executor of an Executor may retain towards Satisfaction of the Debt owing by the first Testator, because he is Executor of the first Testator; but if one be indebted by Bond to *A.* and makes *A.* and *B.* Executors, and dies, and then *A.* makes *C.* Executor, and dies, in this Case *C.* cannot retain, because he is not Executor of the first Testator; but *B.* is his Executor, by Survivorship; and the only Reason of allowing Retainer, is because the Executor cannot sue himself.

ROBERT *Clerkson* and one *Founds*, were Partners in the Trade of a Mercer; *Clerkson* is indebted by Bond to *Edward Hopton* in 2000 *l.* to which the Plaintiff was intitled as his Representative, and in 1300 *l.* to *Dryden* the Defendant's Testator, for which he and *Founds* were bound. *Clerkson* made his Will, and thereof *Dryden* and another Executors, and devises his Lands to them, and their Heirs, Share and Share alike, to be sold for Payment of his Debts, and died; they employ'd the greatest Part of his Personal Estate in paying off a Mortgage of 2000 *l.* charged on the Real Estate devised for Payment of Debts; but kept it on Foot, and took an Assignment thereof to themselves; and *Clerkson* had also a Bond taken in *Dryden*'s Name for Money due to *Clerkson*.

The Plaintiff brought his Bill against the Executors of *Clerkson* for a discovery of Assets, and to have a Satisfaction of his Debt. *Dryden* in his Answer insists to retain out of the Real Estate when sold, and also out of the Personal Estate to pay his own Debt; the Cause proceeded to hearing, and a Decree for an Account; but before any farther Proceedings, *Dryden* dies, having made his Will, and the Defendant *Dryden* his Wife, Executrix,

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(who was before Executrix of *Founds*) and the Cause was revived against her.

For the Defendant it was insisted, that the Mortgage being paid off with the Assets, which *Dryden* her Testator might have retained towards his own Satisfaction, and the Mortgage being kept on Foot, they in whom it is, ought surely in a Court of Equity to be looked on as Trustees for the Defendant for any just Demand he had on the Estate, or paid off with Assets, which he might have retained; and so it will be for the Real Estate too, if *Dryden* and the other Executor were Tenants in Common, as it was urged they were; and that a Court of Equity could not take them from them till they were paid, the Reason of Retainer by an Executor, is, because he cannot sue himself, and the Reason, as to the Heir is the same, and the Law must be so to, tho' there is no Instance of it.

For the Plaintiff, it was insisted, that the Defendant, as Executrix to the first Testator *Clerkson*, cannot pretend a Right of Retainer, for she is not his Executrix, for her Testator was not the surviving Executor of *Clerkson*, but the other Executor, who is still Living; and the Words of the Devise of the Real Estate do not make a Tenancy in Common, and then she has no Capacity of retaining; it was agreed, *Dryden* might have retained, but was not forced to it, *nolens volens*, as was said on the other Side, tho' *prima facie*, it might be looked on as a Retainer. The Testator devised the Mortgage to be paid off out of his Personal Estate, and then to be sold to pay 2000 *l.* to his Grandson, which they have done, and therefore, *pro tanto*, have renounced their Right of Retainer; and this Debt for which the Defendant would Retain, was the Debt of *Founds*, as well as of *Clerkson*, they being Partners and Co-obligors, and she is Executrix of *Founds* also, and hath Assets of his to pay, and therefore could retain only for a Moiety of it.

Lord *Keeper*. An Executor of an Executor may Retain, but not in this Case; the Land being devised to

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the Executors, Share and Share alike, makes, I think, a Tenancy in Common; but here the Executor of the Executor, is not the Executor to the first Testator, and therefore cannot Retain, and the Personal Assets are gone; and the Question is now, as to the Real Estate, and in Equity all Debts are equal; and therefore, if you must come here, you cannot prefer yourself, and a Court of Equity will never assist a Retainer; and these being only Equitable Assets, you ought not to retain to pay all, but only a proportionable Part; and as to the Bond, you are a Trustee, and therefore that must follow the same Rule.

DE
Termino S. Hillarii,
1701.
In Curia Cancellariæ.

Case 151.

Ward versus *Lant*.

One executes a voluntary Bond of 5000 *l.* to one of his Daugters without any Condition, and payable immediately, but always kept it by him; and 'twas proved to be made to skreen himself from Taxes, and so esteemed by that Daughter: and he by Will gives Portions to all his Daughters, and dies, this Bond decreed to be set aside.

MR. *Andrew Lant* had four Daughters, and in 1673 made his Will, and devised to one 1000 *l.* and by the same Will devised to them 1500 *l.* a-piece for their Portions, which last Sums of 1500 *l.* were to be raised out of a Real Estate, devised by his Will for that Purpose; afterwards he marries one of his Daughters to Mr. *Francis Lane*, and gives her 4000 *l.* Portion, and afterwards executes a Bond of 5000 *l.* to another Daughter, but kept it by him, and it was found amongst his Papers after his Death, and there was some Proof in the Cause, that this Bond was entered into to defend him from paying Taxes for his Money; and there was some Proof likewise, that he had told his Daughter not long before his Death, that he intended her the Benefit of the Bond, it was plain he had forgot his Will, for he died not till 1694; and had often said, he had no Will, and 'twas not found till some Years after his Death, by the said Will he had given his Wife (whom he made sole Executrix) some Legacies, but had made no Disposition of the Surplus of his Estate. And the several Questions that were made in the Case were,

1*st.* Whether this Bond were to be paid to the Daughter, or to be set aside.

2*dly.* If it were to be paid, then, Whether it should be taken as a Satisfaction of the Legacies derived to her, or a Revocation of the Will as to them, and whether the unpreferred Daughter should be made equal out of the Surplus before any Distribution (if any were to be made in this Case.)

3*dly.* If there be not a Difference where the Wife has a Legacy, and is made Executrix, and the Surplus not disposed, and where a Stranger is; and if she shall not have the Surplus to her own Use, tho' a Stranger should not, especially in this Case, when the Will was made in 1673; and the Course of distributing the Surplus not introduced 'till long after, and therefore not to be carry'd on in Equity, to take it from the Widow, when the Law was not so at that Time.

My Lord *Keeper* was of Opinion, that tho' there was no Fraud or Circumvention in obtaining the Bond from Mr. *Lant*; yet that it appeared to be his Intention, that no Use should be made of it, for the Bond was without any Condition, and payable immediately, and he always kept it by him; and therefore, if she had got it from him, and put it in Suit against him in his Life Time, he thought Equity would have relieved him against it; that he always declared, that he intended his Daughters equal, and equality is the highest Equity; and the Daughter herself took the Bond to be only to protect him from Taxes; and being voluntary, and only done for that special Purpose; 'tis a Trust for himself, as this Case is, and therefore decreed it to be set aside, this Daughter being equal to the rest without that Bond.

As to Mr. *Lane*'s 4000 *l.* Portion, that must be taken to be a Satisfaction of the 1500 *l.* given her by the Will for her Portion, and a Revocation of the Will, *pro tanto*, but as to the 1000 *l.* Legacy, that being a general Legacy given by the Will, Mrs. *Lane* must have it, notwithstanding the 4000 *l.* given her for her Portion; and the

Personal

Perſonal Eſtate ſhall not go to eaſe the Real Eſtate of the Legacies charged on it by the Will.

Decreed likewiſe, that the Widow muſt diſtribute the Surplus, for tho' the Law was taken otherwiſe at the making of the Will; yet by ſubſequent Reſolutions, the Law is declared otherwiſe, and here is no Circumſtances interven'd to alter the Judgment of the Court to what the Law was taken to be at that Time, as the dying of the Teſtator at the Time of the Will.

As to the *Hotch-potch*, he could ſee no Reaſon againſt it; and therefore the Portion muſt be brought in, and to the Daughters have the Benefit of it, but not the Wiſe, and 1500 *l.* coming of the 4000 *l.* coming out of the Land, this is only 2500 *l.* to be brought into *Hotch potch*,

Caſe 152.
2 Vern. 429.
S. C.

Cook verſus *Parſons.*

A Will of Land wrote by the Teſtator, and publiſhed in the Preſence of three ſeveral Witneſſes, at three ſeveral Times, and atteſted by all at the ſaid reſpective Times, in the Preſence of the Teſtator, ſufficient within the Statute of Frauds; but whether the Man's owning the Writing to be his, in the Preſence of the Witneſſes be ſufficient, Q.

THIS was a Bill of Review to reverſe a Decree of my Lord *Nottingham* in 1682; for Sale of Lands ſubjected by the Will to the Payment of Debts; the Lands were deviſed to Truſtees, and their Heirs, to ſet and Farm let, and out of the Rents (without ſaying and Profits) to pay his Debts, and all his Debts and Legacies being firſt paid, he gave the Surplus to *F. S.*

This Will was wrote with the Teſtator's own Hand, as was proved, and publiſhed in the Preſence of three ſeveral Witneſſes, at three ſeveral Times, and they all atteſted it in his Preſence; but he did not Sign it in the Preſence of the ſecond Witneſs; but only owned the Signing to be his Hand, and deſired him to atteſt the Will, as was proved by that Witneſs.

The Teſtator died, leaving an Infant Heir, and the Land was decreed to be ſold, and no Day given the Infant to ſhow Cauſe againſt it. The Objections to the Decree were,

1*st*, That this is no good Will within the Statute of Frauds and Perjuries, becauſe not atteſted by all the Witneſſes at one Time, and that one of them did not ſee the Teſtator Sign, but only own that it was his Hand. 2*dly*, If the Will had been well executed; yet the Words of it were not ſufficient to ground a Decree for Sale, being only to Let and Set, and out of the Rents, without Saying and Profits, to pay, &c. 3*dly*, That tho' the Words had been ſufficient to bear a Decree; yet the Infant ſhould have had a Day given him, to ſhow Cauſe when he came of Age.

My Lord *Keeper* held a Publication of a Will before three Witneſſes, tho' at three ſeveral Times, good within the Statute, and thought the Writing the Will with the Teſtator's own Hand, a ſufficient Signing within the Statute, tho' not ſubſcribed nor ſealed by him, but doubted whether owning the Subſcription to be his, was ſufficient; but the Validity of the Will is a Queſtion at Law, and therefore ordered it to be tried.

As to the Words Let and Set, and out of the Rents to pay, he held them not ſufficient whereon to ground a Decree for Sale, but the ſubſequent Words, that after his Debts and Legacies paid, it ſhould be to the Truſtees, were ſufficient.

There needs no Day be given the Infant, becauſe the Land is deviſed to the Truſtees, ſo nothing deſcended to the Infant, and there was no Decree againſt him to join, and the Truſtees might have ſold without coming to the Court for Direction; and yet if they do come, it may be a Queſtion, if the Infant Heir ought not to have a Day to ſhow Cauſe; but he thought it not needful in this Caſe, becauſe nothing deſcended to him, nor was there any Decree againſt him to Convey.

Case 153. **Baskerville versus Gore & al'.**

A Father in Consideration of 2600 *l.* to be paid him on his Son's Marriage as the Wife's Portion, articles to settle 600 *l.* a Year on the Marriage; and it being after discovered, that she had only 1600 *l.* the Father was decreed to make a Settlement for the 1600 *l.* only, in Proportion to what he was to have made for the 2600 *l.* and not to deduct out of the 600 *l. per Ann.* 1000 *l.* worth of Land, *viz.* 50 *l. per Ann.* as was urged he should; for then, by the same Reason, if she had nothing, it might have been urged, that only 2600 *l.* should have been deducted out of the Settlement, and he be obliged to settle the rest for nothing.

A Treaty of Marriage was held between the Defendant *Richard Baskerville*, the Plaintiff's eldest Son, and *Jane* his Wife, formerly the Wife of *Rayner*; and the Defendants affirmed she had 2600 *l.* Fortune at her own Disposal, and thereupon the Marriage was agreed on, and Articles entered into, whereby it was recited, that the Defendant *Jane* had a Fortune of 2600 *l.* which was to be paid the Plaintiff (without saying by whom) and in Consideration thereof, the Plaintiff did Covenant with the Defendant *Gore*, Uncle of the Defendant *Jane*, that he would within six Months after the Marriage, on Payment of the 2600 *l.* settle certain Lands in the Articles mentioned, and said to be 600 *l. per Ann.* Value, on the Defendant *Richard*, for Life, then 250 *l. per Ann.* Rent Charge to the Defendant *Jane* for her Jointure, then the whole to the Issue of that Marriage in Tail, with the Remainder to the right Heirs of *Richard.*

The Marriage took Effect, and after it was discovered that 1000 *l.* part of *Jane*'s Fortune was settled by her and her former Husband, *Rainer*, in such Manner, that it would come to the Issue of this Husband (all her Children by her former Husband being dead;) but it could not be paid to the Plaintiff, nor could he have any Benefit of it; so the Articles were not performed on either Side.

The Father brought this Bill against the Son and his Wife, and their Infant Son, and the Trustee in the Articles, that the Articles might be performed mutually in a short Time, or he be discharged therefrom, he being willing, on his Part, to settle on Payment of the 2600 *l.*

It appeared by the Anſwers, that the 1000 *l.* was ſo ſettled, that it could not be paid to the Father; but the Defendants offered, that the Plaintiff ſhould keep 50 *l. per Ann.* Land, out of the Settlement to ſatisfy himſelf that 1000 *l.*

But that the Plaintiff would not ſubmit, and ſaid, it was only paying him out of his own, and might have been with as good Reaſon urged, that if no Part of the 2600 *l.* would have been had, the Plaintiff ſhould have kept 2600 *l.* worth of Land out of the Settlement, and ſo have ſettled the reſt for nothing; for in the one Caſe, as well as the other, it might be ſaid, that the Plaintiff had 2600 *l.* which was all he contracted to have; but the Plaintiff offered, if the 1600 *l.* might be quietly paid him, he would make a Settlement for that, in Proportion to the Settlement he was to have made for the 2600 *l.* but the Defendants did not like this, but inſiſted, there ſhould be only 1000 *l.* worth of Land kept out of the Settlement.

The Maſter of the *Rolls* ſaid, he could not Decree him to do more than make a proportionable Settlement; ſo then the Defendants ſaid, they would find ſome Way or other to raiſe the Money for the Plaintiff, and the Decree was, that if the Defendants did within ſix Months pay the 2600 *l.* the Maſter was to ſee the Settlement made purſuant to the Articles, or if 1600 *l.* then a proportionable Settlement, or elſe the Articles to be diſcharged.

Note, By the Articles, the Son was to have had the Rents from the next Rent Day, and the Father the Intereſt of the Portion; but there having been no Performance, the Maſter of the *Rolls* would not Decree the Plaintiff to account for the Rents, and take the Portion with Intereſt from that Time, the Father not being obliged by the Articles to make any Settlement till the Portion paid.

Case 154. *Darston* versus Earl of *Orford*, & al', Executors of *Russel*, who married Lady *North*, Widow and Executrix of Lord *North*.

After a Bill and Answer put in, the Executor voluntarily paid a Bond Debt, and allowed on the Account, because he might, by confessing Judgment, have preferred him, and no Difference in Reason, where paid without such Confessing.

THE Lord *North* had granted a Rent Charge to the Plaintiff, and covenanted for Payment of it, and it being greatly in Arrear, he died much indebted to several Persons, both by Bond and simple Contract.

The Plaintiff brought his Bill in this Court for a Discovery of Assets, and to have Satisfaction of his Debt. After Process served, and Answer put in, *Russel* voluntarily paid a Bond to *J. S.* without Suit: The Cause proceeded to Hearing, and an Account was decreed. *Russel* died, and the Cause was revived against his Executors only; and the Question was, Whether this voluntary Payment pending a Suit here should be allowed them on the Account.

For the Plaintiff, it was insisted, that it should not, for when a just Creditor makes a Demand in this Court, it is not according to good Conscience not to pay it, and even at Law a voluntary Payment to a Creditor in equal Degree is not good, after an Action brought by another; and it has been adjudged to be the same Thing here, particularly in the Case of *Joseph* versus *Mott*, where Payment on a Recovery at Law, or Action brought after a Bill was depending here, was disallowed on the the Account, after great Debate.

On the other Side, it was said, that tho' a voluntary Payment be not good at Law, after an Action brought by another; yet an Executor in that Case may confess Judgment to which he pleases, and pay with Safety, which here he cannot, nor have an Injunction to stay the Action at Law.

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My Lord *Keeper* thought the Payment ought to be allowed; he ſaid it ſeemed to be admitted, that if the Executor had confeſſed Judgment at Law, the Payment would have been good; and why ſhould not a voluntary Payment, without confeſſing Judgment, be as good in Equity, for there is no Difference in Reaſon; and if Money be to be laid out in a Purchaſe, and ſettled on *A.* in Tail, upon a Bill brought here, the Court will decree the Money to be paid to him; becauſe if the Purchaſe and Settlement had been made, he might have diſpoſed of it, tho' there muſt have been the Formality of a Recovery or Fine, yet being in his Power, it is look'd upon as the ſame Thing; but this is a Point of Conſequence, let the Precedents be ſearched, and I will conſider of it.

Afterwards, 3 *June* 1702, this Cauſe came on again, and ſuch Precedents as could be found, were produced on both Sides; and my Lord *Keeper* ſeemed to be of the ſame Opinion as formerly, and ſaid it was an intolerable Inconvenience, that an Executor might be obliged: You cannot oblige a Man to take leſs than his Debt; and how then can you ſtop him for going on at Law to recover it? The Caſe of *Joſeph* verſus *Mott*, is a Precedent againſt me, but I think that is a direct Change of the Law; but I will conſider of it till to Morrow.

The next Day he ſaid he had conſidered of the Precedents, and was bound up by them, and therefore ordered the Exception taken by the Defendants to the Maſters Report to be over-ruled, and the Payment (being voluntary) to be diſallowed; but he ſeemed to diſapprove of the Caſe of *Joſeph* verſus *Mott*, where the Judgment at Law was fairly obtained.

Note; Afterwards an Appeal was brought in the Houſe of Peers from this Decree, and on the 21ſt Day of *November*, 1702, the Decree was revers'd, and the Payment allowed.

De Termino Paschæ, 1702.

In Curia Cancellariæ.

Case 155. One devises all his Real and Personal Estate for Payment of his Debts and Legacies, and dies; a Creditor obtains Judgment against the Executor; and then he and some other Creditors, who had not obtained Judgments, bring their Bill, and had a Decree for Sale of the Estate, and to be paid their Debts in Proportion. The Judgment Creditor received several Dividends, after having proved his Debt before the Master, then petitioned for a Re-hearing, on Pretence that he being a Judgment Creditor, ought to have a Preference before the other Creditors, at least out of the Personal Estate; but the other Creditors having joined in the Bill, and contributed to the Charges of the Suit, and several Dividends being made pursuant to the Decree, the Court wou'd not alter it, and held, that if any Preferences were to be, the Plaintiff ought to bring what he received into *Hotch-potch*, and that he ought to take either all Law or all Equity.

Shepherd versus *Kent*.

MR. *Richard Kent* being greatly indebted to several Persons, borrowed 8000 *l.* of the Trustees of the Earl of *Kildare*, and gave them a Note under his Hand, that for securing the Repayment of that Money with Interest, he wou'd make them a Mortgage of an Estate in *Wiltshire*, which he then had lately purchased of Sir *Edward Hungerford*; but before it was done, Mr. *Kent* died indebted to several Persons by Bond and Simple Contract, having by his Will devised an Annuity of 500 *l. per Ann.* to his Wife, and several other Legacies, and devised also his Estate Real and Personal for Payment of his Debts and Legacies.

The Earl of *Kildare* and his Trustees, brought a Bill against the Executors and two others, who were Devisees, and likewise Creditors of the Testator, to have the Lands mentioned in the Note, made a Security for the 8000 *l.*

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and on hearing of that Cauſe, it was decreed that Eſtate ſhould be ſold, and that out of the Purchaſe-Money the Earl ſhould be paid in the firſt Place, and that then the reſt of the Creditors ſhould be paid in a Courſe of Adminiſtration.

The now Plaintiff, and ſeveral others of the Plaintiffs, who were no Parties to the firſt Decree, brought Actions at Law againſt the Executors upon their Bonds, and recovered Judgment; and afterwards they and ſome others of the Plaintiffs, who had obtained no Judgments, brought this Bill againſt the Earl of *Kildare* and his Truſtees, and againſt *Kent*'s Executors and others, ſetting forth their Debts; and that the Executors concealed the Aſſets, and pretended to prefer other Creditors of an inferior Nature; and for that Purpoſe pretended that the Earl of *Kildare* had obtained a Decree to have his Debt (which was ſecured only by a Note) paid him before them, which if it were ſo, was obtained by Colluſion, and wou'd not have been ſo decreed, in Caſe a proper Defence had been made; and they being no Parties to that Suit, ought not to be bound by it, but that it ought to be ſet aſide.

The Cauſe came to a Hearing, and the Court declared they ſaw no Reaſon to alter the Earl of *Kildare*'s Decree, ſo as againſt him. The Bill was diſmiſs'd.

Then the Decree went on farther, and ſaid, that all the Eſtate of Mr. *Kent* ſhould be ſold, and the Money brought before the Maſter, and the Creditors ſhould go before the Maſter, and prove their Debts; and after Payment of the *Earl* of *Kildare*, the Surplus to be divided amongſt the reſt of the Creditors proportionably; and the Plaintiff *Shepherd*, and the others, who had obtained Judgments, went before the Maſter and proved their Debts, and as the Money was brought before the Maſter, received ſeveral Dividends of the Money ariſing by Sale of the Real Eſtate.

There being a conſiderable Sum before the Maſter, which was raiſed by Sale of the Perſonal Eſtate, *Shephard* and

and the other Creditors, who had obtained Judgments, petitioned for a Rehearing of the Cause, for that the Decree ought to have given them a Preference before those Creditors who had not obtained Judgments, at least out of the Personal Estate, and so had the Decree done that was at first made, on hearing of the Earl of *Kildare*'s Cause, by saying, *That after he was satisfied, the other Creditors should be paid in a Course of Administration.*

The other Creditors who had no Judgments, opposed altering the Decree, and said, the Plaintiff and the other Judgment Creditors ought to take all Law or all Equity; and now they had brought them in here by this Bill, and made them contribute to the Charges of this Suit, and had received Dividends under the Decree, they ought not to alter it on a Re-hearing to prefer themselves; and that a Judgment obtained after the first Decree ought not to avail them; besides, if the Plaintiffs wou'd have Advantage of their legal Preference, they ought to bring all they had received by Virtue of their Judgments into *Hotch-potch.*

'Twas replied, that they having a legal Preference by their Judgments against the Executors, and their Bill being only to give them a Preference before the Earl of *Kildare*'s Note, which was not allowed, they ought to have been dismiss'd generally; and their receiving their Shares before the Master of the equitable Assets, where they had no Preference, ought not to prejudice them as to the Personal Assets, where they have a Preference; and there can be no Pretence for their bringing any Thing into *Hotch-potch.* A Man indebted by Bond devises his Real Estate for Payment of his Debts, a Creditor recovers Judgment against his Executor, but the Real and Personal Assets will not pay all the Debts, shan't his Judgment entitle him to the Personal Assets? And shall he not come in for his Proportion also of the Equitable Assets, for what remains unpaid? Or if one has both a Bond and a Mortgage for his Debt, and one

is worth nothing, shan't he make up the Inconveniency of the one by the other, and foreclose, if not paid?

Lord *Keeper.* This Point is not now before me, and if it were, I think, if they would have any Benefit of the Equitable Assets, they ought to bring what they had received into *Hotchpotch.* As to the Decree, I am of Opinion it is just, and will not alter it; when you, who are a Judgment Creditor, bring a Bill with others, and pray a Satisfaction of your Debts, and Relief, I think you ought not afterwards (when you have made them contribute to the Charge) to make Use of any legal Preference.

Tovey versus *Young.*

Case 15[illegible].
4 *Mod.*
2 Vern. 4[illegible].
S. C.

Verdict being recovered in *Suffolk* by the Factors against the *London* Cheesemonger, they brought their Bill for a new Trial in an indifferent County, but the Bill dismissed.

A Factor buys Cheese for his Principal, and then breaks, and an Action is brought against the Principal, and a Recovery at Law; the Plaintiff here endeavoured in the Court of Law to have got a new Trial, but was denied it.

And now this Bill was brought, and suggested for Equity, that before the Cheese was bought, he had countermanded the Authority of the Factor, and that the Defendant had Notice of it (but that was denied by the Answer, and not proved).

Another Suggestion was, that there could not be an indifferent Trial in *Suffolk*, for that almost all the Freeholders there were concerned in Interest, and had declared they never wou'd find against their Countrymen.

The Plaintiff likewise found out since the Trial, that the principal Witness, on whose Testimony the Recovery was had, was Partner with the Insolvent Factor, and cited the Case of *Hennell* versus *Kennell,* 11 *February,* 28 *Car.* 2. where an Action was brought against an Administrator, who pleaded *plene Administravit*; and the Trial was brought down by *Proviso*; and at the Trial the Defendant being put to prove a Sum of 50 *l.* paid

 before

before the Plaintiff's Original, which not being provided to do, a Verdict was against him; yet after finding the Note, whereby his Witness was enabled to swear that Matter, on a Bill brought here, a new Trial was granted: And *Humphreys* versus Sir *Robert Payton*, 11 *November*, 15 *Car.* 2. where a Recovery in a Trial at Barr was set aside, on new Matter discovered; and affirmed on Rehearing, 2 *May*, *Ives* versus *Hanks*, 8 *December*, 3 *Jac.* 2. of a *Cheshire* Factor, alledging, he sold to him as a Merchant, and not as a Factor; and *Tills* versus *Wharton*, first heard here, and after in the House of Lords, where a new Trial was granted after a Trial at Barr.

Lord *Keeper*. Bills for new Trials ought to be reduced to some Certainty; the Grounds for Relief were usually Partiality in the Jurors, or new Discoveries; as to the 1st, the Trial is to be by a Jury *de Vicineto*; but if Cause, the *Venue* may be changed to another Place, Challenges may be allowed, or an Attaint granted, and these are to be at Law; and the Court where the Cause is tried, may, if they see Cause, grant a new Trial, which here you have attempted, but could not prevail, and I can't grant a new Trial for Partiality; New Matter may in some Cases be Ground for Relief; but it must not be what was tried before: Nor when it consists in Swearing only, will I ever grant a new Trial, unless it appears by Deed or Writing, or that a Witness, on whose Testimony the Verdict was given, were convict of Perjury, or the Jury attainted; and it does not appear the Witness and Plaintiff at Law were Partners; and if the Jury had declared they wou'd find for the Plaintiff, the Court at Common Law would have taken Order in it. The Case of *Gratiam* was Matter in Writing; and in the Case of *Humphreys* versus *Payton*, it does not appear what the new Matter was. *Ives* versus *Hawkes* was tried in *Nottinghamshire*, and not in *Cheshire*, and went without Defence; yet a new Trial was denied at Law, but granted here, because the Right had never been try'd; but that was not for Partiality. *Tilly* versus *Wharton* dif-

fers much. *Tilly*'s Bill was dismiss'd, and *Wharton*'s Cross Bill came on, and a Satisfaction of the Bond decreed out of the Trust Estate that was altered above, and another Trial granted, and that went a contrary Way; and Controversies this Way will never have an End.

Note; This was first heard at the *Rolls*, and dismiss'd; and now that Decree confirmed on Appeal.

Brewin versus *Brewin*.

Case 157. *May* 13.

A Term is created by Marriage Settlement to raise 3000 *l.* for Daughters Portions, within two Months after the Death of the Survivor of the Husband and Wife, there being one Daughter; the Father devises the Trust Lands to make good his Wife's Jointure, and to raise 3000 *l.* for his Daughter's Portion, the Daughter shall not have two Portions of 3000 *l.* and she dying at the Age of five Years, and the Portion to be raised out of Land, it shall not be raised for her Administrator, but the Interest or Maintenance the Child was intitled to shall.

A Man by his Marriage Settlement creates a Term for raising 3000 *l.* for a Daughter and Daughters of that Marriage, to be equally divided between them, if more than one, and to be paid within a Year after his and his Wife's Death.

Then he by Will (having one Daughter, his only Child, and Heir) devises the Inheritance of several Lands to his Wife, to make up her Jointure 300 *l.* *per Ann.* and for raising 3000 *l.* for his Daughter's Portion, without limiting any Time of Payment, and devises the said Lands so charged by the Settlement with the 3000 *l.* to his Brother.

The Daughter brought a Bill against the Devisee of the Lands, to have the 3000 *l.* or Foreclosure, but died, pending the Suit about five Years of Age.

Her Mother Administers and revives the Suit, and insisted on the Case of the Earl of *Rivers* versus *Derby*, and that there was no Provision for Maintenance for the Daughter, till the Portion became payable, and therefore it was payable presently.

The Defendant alledged by his Council, that if the Case rested on the Deed alone, the Plaintiff could have no Right, and the Will does not mend it; the 3000 *l.* by

by that is the ſame as the 3000 *l.* by the Deed, for they do not demand two 3000 *l.* and then it muſt ſtand on the Deed.

As to the Time of Payment, the Will having appointed no Time at all; but taking it in the moſt favourable Senſe for the Infant, it can be conſtrued (being a Portion) payable only when ſhe wanted a Portion, which could not be at five Years old; and this Caſe is upon the Reaſon of all the Caſes of *debitum in preſenti ſolvendum in futuro*, and ſo within the Rule of *Pawlet* verſus *Pawlet*, 2 *Vent.* and the Will was only to better the Fund, the Settlement being defective in Value, and is plainly not ſubſtantive, but relative to the Deed; and if it were, 'twould be againſt them; for being a Portion, and out of Lands, 'twou'd ſink for the Benefit of the Heir; and the Diſtinction between a Deed and a Will has been exploded even in that Caſe.

Lord *Keeper*. If it had been a Perſonal Legacy, it muſt have been paid, and that preſently, tho' the Child dies before the appointed Day, or as a Deviſe out of Land by the Will, tho' no Time of Payment limited; but here the Will is relative to the Settlement, and both make but one Security; and by the Will the Portion ſhould have been raiſed in a reaſonable Time, when the Child came to want it, but not preſently, tho' ſhe ſhould have had reaſonable Maintenance. In the mean Time 'tis within the Rule of all the former Caſes, in Caſe of a Perſonal Legacy, payable at 21, or Marriage, I think the Court always appointed Maintenance out of the Intereſt of it, but not expreſly limited otherwiſe in the mean Time, and the Bill was diſmiſs'd by the Maſter of the *Rolls*, and affirmed on Appeal, but the Land was charged with 100 *Marks per Ann.* Maintenance for the Child whilſt it lived.

3 *Kent*

Kent versus *Kent*.

Case 158.

After a Decree to Account and Abatement of the Suit by the Defendant's Death, his Representative may revive.

ON a Motion this Day made, and Debate of the Matter, it was held by the Lord *Keeper*, that where a Decree is for an Account, and then the Cause abates by the Defendant's Death, his Representative may revive as well as the Plaintiff, both being in Nature of Plaintiffs.

DE Term. S. Trinitatis, 1702.

In Curia Cancellariæ.

Case 159.

Bateman versus *Bateman*.

Whether Equity can give Relief on the Statute against fraudulent Devises being introductive of a new Law.

A Man binds himself and his Heirs, and dies, leaving a Real Estate to descend to his Heir, subject to a Mortgage for Years; the Heir aliens the Real Estate before a Bill brought; and if the Obligee was relievable here against the Heir, and Purchasor, on the Statute for preventing fraudulent Devises, or if he was to be sent to Law to get Judgment first, was the Question.

My Lord *Keeper* thought, that Statute being introductive of a new Law, the Relief on it must be at Law, and held likewise, that a Bond Creditor could not redeem a Mortgage for Years, without first having Judgment at Law against the Heir, though it might have been otherwise, in Case of a Mortgage in Fee.

Note; Chancey al cet jour done Relief sur dit Stat. en tiel Case.

Ive versus *Ash.*

Case 160.

The Statute of *Ed.* 6. does not extend to Military Offices; and the 7 *W.* & *M.* only to Horse, Foot, and Dragoons.

THE Defendant being a Captain of Marines, agrees with the Plaintiff to sell it him for 600 *l.* to be paid such a Day agreed on between them, and the Defendant agrees to procure a Commission to be signed by the *King* for the Plaintiff by that Day, to be Captain in the said Regiment; and the Plaintiff gave a Bond for Performance of the Agreement, and a Warrant of Attorney to confess Judgment, which after was entred up.

The Defendant quitted his Employment, and gets the Commission signed by the Time, and 'twas left in the Secretaries Office, and the Plaintiff had Notice of it; but he being desirous to go off from his Bargain, wou'd not take it out; and so the Captain's Place was given to another.

The Plaintiff being prosecuted at Law, on the Judgment, brought this Bill, and now insisted, that by the Statute of *Edw.* 6. against selling Offices, the Bargain was void, at least by the 7th of *W.* and *M.* which enacts, That every Commission Officer before his Commission registred, should take the Oath there mentioned, that he had not directly or indirectly given any Thing for procuring the Commission, but the usual Fees, which the Plaintiff could not do; and therefore as to him it was *nudum Pactum*, and an Undertaking to procure a Commission for him must be intended, such a one as he might have Benefit by, which here without Perjury he could not; and the Defendant being an Officer, knew of this Law, tho' the Plaintiff did not, and so 'twas a perfect Surprize upon him, and he having no Benefit by it, ought to pay nothing for it.

On the other Side it was said, and the Court was clearly of the same Opinion, that this is not within the Statute of *Edw.* 6. and as to the other Statute, it extendeth only to Horse, Foot, and Dragoons, not to the

Marines;

Marines; and if it did, yet it did not prohibit selling, but only provides, that the Officer shall take the Oath, and the Defendant has lost the Employment, and done all, that by the Agreement he was obliged to do. Suppose the Plaintiff had been obliged to take any other Oath, and would not have taken it, must the Defendant have lost his Money and Place; and therefore the Court held, that he must pay the Money, and his Lordship likened it to a Bond, *pro ensia mento & favore*, which if reduced to a Judgment, 'tis not avoidable at Law, nor ever relievable here; and the Plaintiff was decreed to pay the principal, Interest and Costs at Law, but not here.

This Decree was affirmed on Appeal to the House of Lords, and on Enquiry of Officers, the Marines were not looked upon to be within the Statute of 7th of *Will.* and *Mary*, nor required to take the Oath.

Case 161.

Crowther versus *Crawley*.

A. takes a Goldsmith's Note from *B.* who was his Debtor, when he might have been paid ready Money. The Goldsmith Fails before the Money could be received, *A.* shall bear the Loss, tho' no neglect in him.

A Man takes a Goldsmith's Bill from his Debtor, when he might be paid Money; afterwards, and before the Bill could be received (without any Default or Neglect of him that took it) the Goldsmith fails; he that took the Bill shall bear the Loss; and the Lord *Keeper* thought it ought to be so always on a general taking, unless the Party who gives the Bill Warrants it for a certain Time, for then it is his Hazard during that Time.

Case 192.

Eales versus *England*.

A. Devises 300. to *B.* which he Wills him to give *C.* his Daughter at his Death, or sooner, if there be Occasion, for her better Preferment. *B.* dies before the Testator; but *C.* survived, and died at the Age of 16 Years, this is not a lapsed Legacy, but shall go to the Representative of *C.* *B.* being only in the Nature of a Trustee.

Elizabeth Heydon made her Will, and devises in these Words, *I give to* B. 300 l. *one* 100 l. *whereof he owes me by Bond, which I intended to have given his Daughter* C. *but my Will is, that he give the said* 300 l. *to*

to C. *at his Death, or sooner, if there be Occasion for her better Preferment*, and makes the Defendant Executor.

B. dies before the Testatrix, and *C.* survived the Testatrix; but died about the Age of 16 Years, and the Plaintiff takes Administration to her; and the Question was, Whether this be not a void Legacy, *B.* dying before the Testatrix?

'Twas said for the Plaintiff, that *C.* was in Nature of *cestui que Trust*, and therefore the Legacy not lost by the Death of the Trustee before the Testatrix, and she could not mean any Benefit to *B.* because, if a Match had offered he would have been compellable to pay it before his Death.

On the other Side, 'twas said, the Gift was to *B.* and the Trust for *C.* only for particular Occasions, which by her Death are at an End, suppose *B.* had survived the Testatrix and *C.* could her Executor have taken it from him? The Case of Lord *Kennet* versus Duke of *Bedford*, was the same Case of a Real Estate, that the Devisee should at his Death devise the Lands to the Lord *Goring* and *per* Lord *Nottingham* decreed only a Recommendation not a Trust.

For the Plaintiff it was farther urged, that the Question here was only between the Administrator of *C.* and the Executor of *Elizabeth*; suppose the Use had been given to *B.* for Life, and after to *C.* tho' *B.* had died before *Elizabeth*, yet *C.* would have had it presently, and the Desire is absolute to give *C.* at his Death. A Man gives 200 *l.* to the Mother, willing her to devise it over to the Daughter, 'twas decreed at the *Rolls* it should go to the Representatives of the Daughter, and that Decree was affirmed by my Lord *Somers*.

The Master of the *Rolls* said, there is in the Will a Devise of all the Rest and Residue not before devised, therefore this cannot go back to the Executrix as a lapsed Legacy; but is, as if 'twere given to *B.* for Life, then to *C.* then it would certainly have gone over, and *C.* might have had a Bill for it in his Life, if there had

been Occasion, and he had survived *Elizabeth*, and Words of Recommendation and Desire in a Will, are always expounded a Devise, and here *B.* is but a Trustee, which will not Prejudice *cestui que Trust*: If the Trustee die without Heir, the Lord by Escheat will have the Land at Law, yet subject to the Trust here, therefore he decreed it for the Plaintiff.

Case 163.
2 Vern. 461.
S. C.

Rook versus *Rook.*

A. seised in Fee, devises *Black Acre* to *B.* for Life, and devises to *C.* all his Lands not before devised to be sold for Payment of Debts; by by this Devise, of *all his Lands*, &c. the Reversion of *Black Acre* passes to *C.*

ONE devises *Black Acre* and *White Acre* to *A.* and after by the same Will devises to *B.* his Executor, all his Lands not before particularly disposed of, to be sold for Payment of Debts; and the only Question was, Whether this would pass the Reversion of *Black Acre* and *White Acre.*

'Twas argued, that it shall not, because all the Land not before particularly disposed of, is exclusive of the Lands before devised, tho' the whole Estate in them is not devised, and that an Heir is not to be disinherited on doubtful Words.

On the other Side, 'twas said, these Words were only meant to have such Estates as had been before devised, not to exclude the Remainder of them for passing, for which was cited *Allen* 28. *Hely* versus *Hely*, 3 *Mod.* and the Testator had no other Lands left to devise but the said Reversion.

My Lord *Keeper* was clear the Reversion passed; and on Advice with all the Judges of *C. B.* they all held so too, on a Case stated to them for their Opinion.

Mrs. *Ash*'s Case.

Case 164.

MRS. *Ash* was committed as a Lunatick, and whilst she was under Commitment, was forcibly taken away by Mr. *Parker*, and married to him (for which Contempt to the Court he was committed) and the Marriage controverted in the Spiritual Court, and she was now brought into Court to be inspected; and on her Inspection, my Lord *Keeper* was of Opinion she was in her right Mind, and the Question was, Whether she should be discharged of the Commitment, and left to her Husband; or if she were to be continued under Commitment, if her Husband *Parker* should be the Committee?

If one Marries a Lunatick, who is under the Care of the Committee of the Court. This is a Contempt, for which the Person marrying may be committed, and Marriage is no *Supersedeas* of the Commitment, so as to take him or her out of the Custody of the Committee.

Sir *Thomas Powis* said, several married Women have been committed, and cited one *Grono*'s Case in 1698; he married, and after was committed to his Sister, and on a Prosecution the Marriage declared void in the Spiritual Court; for Marriage, tho' it were an undoubted one (which this is not) does not take her out of the Committee's Custody; and there is no Case makes any Diversity between a married Woman and another; for the Husband himself hath not the Commitment as Husband, when he is Committee.

Sir *John Hollis* cited *Clark*'s Case, where the Marriage was disowned; and *Emerton*'s Case, where on Trial before the Lord *Hales* concerning her Marriage, the Woman was sequestred, but *Windham* was against it; and in *Bicknal*'s Case, the Woman was left at Liberty. Mr. *Fane*'s Wife was at first committed to a Stranger, and after to her Husband.

Lord *Keeper*. Tho' she is not out of Order now, she may be again, the Commitment is *Regium Munus*, not a Prerogative, but a Duty; and the Marriage, tho' good

good, is no *Superſedeas* to it, as was held in *Fane's* Caſe, but is controverted; but I think ſhe ought not to go back again to the ſame Commitment, though I will not now diſcharge her from it; ſuppoſe ſhe did contract when mad, and agreed and conſummated when ſober, 'twould be good.

Sir *John Cook* being aſked, if he had known the Party ſequeſtred, where the Mariage was conſummated, anſwered, Yes, often, how elſe ſhall the Marriage be controverted.

DE
Termino S. Mich.
1702.
In Curia Cancellariæ.

Henriques versus *Franchise*. Case 165.

THE Defendant had Stock in his Name in the *East-India* Company, in Trust for the *Plaintiff*, and a Bond in his own Name from the Company, but in Trust for the Plaintiff; and the Plaintiff being beyond Seas, drew a Bill on the Defendant, and promised to send him in Effects wherewith to pay it.

The Defendant accepts the Bill, and after, but before the Day of Payment, the Plaintiff Fails, and afterwards the Defendant sells the Stock and Bond (at great Discount) at the then currant Price, to enable him to Answer the said Bill. Two Years after, the Plaintiff comes to him to sell and reimburse himself; the Stock and Bond 'rose in Value, and now on a Bill brought for an Account, the Question was, If the Defendant should account according to the Value he sold them at, or according to the then current Value.

Per curiam. The Want of Effects was sufficient to justify the Sale without Orders, for so much as was necessary to pay the Bill; but the Stock alone appearing sufficient for that Purpose without the Bond, the Defendant must answer the Value of that, as it was, when

the Plaintiff gave Directions for the Sale, and decreed accordingly.

Case 166.

Wood & Ux' versus *Fenwick* & Ux'.

One being poor drawn in to sell an Estate at a great under Value; yet, if no Fraud, cannot be relieved.

THE Plaintiff *Wood*'s Wife, as Heir to her Brother, had an *Inn* in *Newcastle* descended to her, which was Let at 69 *l. per Ann.* but was subject to a Mortgage. The Plaintiffs being poor, were inveigled to sell this *Inn*, and all their Interest therein, to the Defendant *Fenwick*, for 80 *l.* and after, brought a Bill for Relief against the Mortgage, and all other his Debts; and at the End of the Bill pray Relief on the whole Matter, and the Administrator was made a Defendant.

On hearing of the Cause, my Lord *Keeper* was of Opinion, that tho' the Purchase was not a fair Bargain, yet no such Fraud appeared as to set it aside.

Then the Plaintiffs insisted, that if the Court would not set aside the Conveyance, yet they had a Right to have the Personal Estate applied to exonerate the Mortgage, which they had not sold to the Defendant, nor received any Consideration for it; and therefore having the Administrator, and all proper Parties before the Court, were proper to ask a Decree to have so much out of the Personal Estate, as would have exonerated the Mortgage.

My Lord *Keeper* said, he thought the Bill not proper for that Purpose; but declared, if it had, he should not have extended that Matter so far; for that the Equity that an Heir has in such a Case, is only for the Sake of the Real Estate descended to him, that that may be clear to the Family; and here the Heir having parted with the Real Estate, has no Right to the Personal Estate, which he might have demanded to exonerate his Real Estate, in Case he had kept it, so the Bill was dismiss'd.

Jesson versus *Essington*.

Case 167.

By a Devise of all Rings and Houshold Goods, Plate used in the House, does not pass.

IN this Case, my Lord *Keeper* was of Opinion, that by a Devise of all Rings and Houshold Goods, Plate used in the House did not pass.

Another Point debated was, if a Freeman of *London* dies, leaving several Orphans, and any of them die under Age, whether his Part is by the Custom to go to the Survivor.

Vernon for the Plaintiff argued, that it did by the Custom go to the Survivor, and had known a Case where one married an Orphan, and made a Settlement on her, and she after died under Age, her Fortune went to her surviving Brothers and Sisters, and her Husband could not have it; 'twas admitted by the Court and Council, that the Father's Will in this Case (which gave it to the Survivors) did operate nothing, because they did not claim under him; but by the Custom paramount the Will, tho' a Case was cited *Temp. Eliz.* where it was held, that the Father may devise the Orphanage Part of a Child, if he die within Age; so that it be not to the Prejudice of another Orphan.

Afterwards 5th 1702, the Recorder certify'd the Custom to be, that if the Orphan Son dies before 21, his Share Survives; and if a Female dies unmarried, and within the Age of 21, her Share Survives likewise, and the Orphan cannot give it away by Will.

Feaubert versus *Turst*.

Case 168.

An Agreement made at *Paris* on the Marriage of two *French* People touching the Wife's Fortune, decreed here to be executed accordingly.

ON a Marriage of two *French* People in *France*, the Contract was, That the Husband surviving the Wife, should have two Thirds of her Fortune for Life (whereas by the Custom of *Paris*, where they married, he would have had but a Moiety) and 300 Livres in the first Place, by Way of Present, and that the rest should

go

go according to the Custom of *Paris*; after, they fled hither from the Persecution; and several Years after, the Wife died, her Relations brought a Bill for an Account of the Estate, and to have the Benefit of the said Contract.

'Twas objected they could not bring over the *French* Law hither, but must now be governed by the Laws of *England*, where the Husband surviving is intitled to all the Wife's Personalty, at least, there was no Colour to carry it further than the Sum stipulated in the Contract, and not to that which was left to go according to the Custom of *Paris*, which is only a Local Law, and therefore they could have no Benefit of it here.

'Twas answered, that Marriage Contracts are to be supported in all Countries, without Regard to the Place where made; and that this Contract did extend to the whole Fortune of the Wife, and not only to the Particulars mentioned; and the saying the rest should go according to the Custom of *Paris*, is as much as if the Custom had been recited at large, and that the Fortune should go so.

My Lord *Keeper* decreed Relief only as to the Sum stipulated; but on Appeal to the Lords, they had Relief for the whole.

Case 169.

Croyston versus *Banes*.

If on a Bill brought to have Execution of a Parol Agreement; the Defendant by Answer confesses the Agreement without insisting on the Statute of Frauds, &c. the Court will decree an Execution, because no Danger of Perjury.

IN this Case the Master of the *Rolls* declared, that if a Bill be brought here for Execution of a Parol Agreement, which is in no Part executed, if the Defendant does by Answer confess the Agreement without insisting on the Statute of *Frauds* and *Perjuries*, the Court will decree an Execution of the Agreement, because when the Defendant confesses it, there is no Danger of Perjury, which was the only Thing the Statute intended to prevent.

Martyn

Martyn versus *Kingsly*.

Case 170.

IN this Case a Difference was made, where a Man trusts his Scrivener (who puts out Money for him) with the Custody of his Bond, and where with the Custody of his Mortgage; in the first Case, if he receive the Money, and delivers up the Bond, this shall barr the Obligee; not so in the Case of a Mortgage, because a legal Estate is vested, which cannot be divested without Assignment.

If one trusts his Scrivener (who puts out Money for him) with the Custody of his Bond, and the Scrivener receives the Money, and delivers up the Bond, the Obligee is barred as against the Obligor for ever; *secus* in Case of a Mortgage, because a Legal Estate is vested, which cannot be divested without Assignment.

Rudyard versus *Neirin* & ux.

Case. 171.

THE Defendant *Hannah* being Daughter of Mr. *Hampton*, on a Marriage Treaty between her and the Plaintiff's Testator's Son *Thomas Rudyard*, in Consideration of 1200 *l.* paid, or secured to be paid to the Father and Son, or one of them, in Part of her Portion, and in Consideration 1200 *l.* more, due and owing to her by the *Chamber* of *London*, and other Exspectancies out of the Personal Estate of her Father; and in Consideration of 5 *s.* a Settlement was made on her by Way of Jointure, and a Covenant in the Deed, that the Jointure Lands were of the clear Yearly Value of 240 *l. per Ann.*

A Woman having 1200 *l.* in Possession, and 1200 *l.* in the Chamber of *London*, on her Marriage, the Husband's Father, in Consideration of this Fortune, settles 240 *l. per Ann.* Jointure on her; the Husband dies, and the Wife administers to him, and the Representatives of the Husband's Father bring a Bill for the 1200 *l.* in the *Chamber* of *London*, the Father being, as alledged, a Purchaser of it by the Settlement. Bill dismiss'd the Husband, having done nothing to alter the Property in his Life-time.

The Marriage was had, and *Thomas Rudyard* the Son died intestate without Issue, and without making any Alteration [illegible] Debt due from the Chamber of *London* to his Wife; she takes out Administration to him, and afterwards intermarried with the Defendant.

Thomas Rudyard the Father died, having made his Will, and his Wife Executrix, who never demanded this

Debt

Debt, but died, having made her Will, and the Plaintiff her Executrix; and there having been a little before the Death of *Thomas Rudyard* the Father, an Act of Parliament made for turning the Chamber Debt into a perpetual Interest.

The Plaintiff as Executrix of *Mary Rudyard*, who was Executrix of *Thomas Rudyard* the Father, brought this Bill against the Defendants to have an Account of this Debt, and to have it assigned to her, for that, as 'twas alledged, the Settlement did amount to an Agreement, that the Father should have the Benefit of this Debt, the Settlement being made by him, and this being Part of the Consideration, and therefore she as his Representative intitled to the Benefit of it; or if it should be taken upon the Wording of this Deed, that the Father and Son were jointly intitled to it, the Father would have the whole by Survivorship; or if it were to go equally to the Father and Son, she as Representative of the Father, wou'd be intitled to a Moiety of it.

The Defendant insisted, that when he married his Wife, he took this Debt to be her own, and that this did not amount to an Agreement, that either Father or Son should have this Debt otherwise than as it did belong to the Wife; and tho' 'tis true, he as her Husband might have disposed of it; yet having done nothing of that Kind, it does now belong to the Wife that has survived him; and of that Opinion was my Lord Keeper, and dismiss'd the Bill.

Case 172.
9 December.

Barlow & ux', versus *Heneage.*

A Father makes a voluntary Settlement to Trustees and their Heirs in Trust, to receive the Profits, and to put them out for the Increase of the Fortunes of his Daughters *A.* and *B.* and also executes a Bond to the same Trustees to pay them 1000 *l.* at a certain Day, in Trust for the said Daughters, but kept both Deed and Bond by him till his Death, and received the Profits; and then by Will taking Notice of the Bond, gives Legacies to *A.* and *B.* in Satisfaction thereof, and the Surplus of his Personal Estate to his said two Daughters and his four younger Children; yet *A.* and *B.* electing to have the Benefit of the Settlement and Bond decreed for them, and an Account of the Profits from the Date of the Settlement, and the 1000 *l.* with Interest, from the Time it was payable by the Bond.

THE Case was, *George Heneage* made a voluntary Settlement to Trustees and their Heirs in Trust, that they should receive the Profits, and put them out

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from Time to Time for the Increase of the Fortune of his Daughters *Winifred* (the now Plaintiff) and *Cicely*; and if either of them died before 18, or Marriage, the whole to go to the Survivor, and entred into a Bond of 2000 *l.* Penalty to the same Trustees, to pay 1000 *l.* to them at a certain Day in Trust for the said Daughters,) but kept both Deed and Bond in his own Power, and received the Profits of the Estate till his Death.

Afterwards by Will, taking Notice of the said Bond, he gives to his said two Daughters, Legacies in full Satisfaction of the Benefit of the said Bond; and the Surplus of his Personal Estate, after Debts and Legacies paid, to go equally between the said Daughters, and his four younger Children.

The Plaintiffs brought this Bill to have an Account of the Personal Estate, and a Satisfaction for the Profits of the settled Estate, from the Date of the Settlement, and the 1000 *l.* with Interest, from the Time it was payable.

'Twas objected, that the Settlement and Bond being both voluntary, and always kept by the Father in his own Hands, and so might have been destroyed when he pleased, were to be taken only as a cautionary Provision, in Case of sudden Death, and therefore they ought not to have either Profits or Interest, farther than from the Death of the Father; and the rather for that, otherwise it would swallow up all the Personal Estate, and leave the younger Children unprovided for.

But my Lord Keeper said, these were the Father's Deeds, and he could not derogate from them; but at last the Defendants agreed to set the Profits of the Lands received during the Father's Life against the two Daughters Maintenance, but insisted to have Interest on the Bond for the Time the Money was payable, and 'twas decreed accordingly.

Earl

Case 173.

Earl of *Peterborough* versus Dutchess of *Norfolk*.

Depositions taken in a Cause wherein Tenant in Tail, or the Father is only Tenant for Life; Remainder to the Son cannot be read against the Son.

IN this Case my Lord *Keeper* declared his Opinion, that Depositions taken in a Cause where Tenant in Tail is Party, cannot be read against the Issue in Tail. But *Note*; This was extrajudicial, and not the Point in Question, for the Case at the Barr was of Tenant for Life, with Remainder to his Son in Tail; and the Depositions were taken in a Cause, wherein only the Father Tenant for Life was Party.

Case 174.

Button versus *Price*.

No Proofs to be read in the House of Lords, which were not made Use of in Chancery.

THIS Cause was heard by Default in Chancery, and this Decree made absolute by Default; and the Defendant brought an Appeal before the Lords, but the Proofs not having been read below, they would not suffer them to be read above; so the Appeal was dismiss'd.

DE

DE

Termino S. Hillarii,

1702.

In CURIA CANCELLARIÆ.

Warr versus *Warr*.

Case 175.
26 *February*.

Portions provided by Marriage Settlement for younger Children, to be paid at such Time as the Trustees shall think proper. One of the Children dying at seventeen before any Appointment, his Portion shall sink in the Inheritance; but Maintenance, and a Sum paid in placing him out Apprentice to be allowed out of the Trust Estate.

UPON a Marriage Settlement, the Father had Power to raise a Term for 99 Years, in Lands, not exceeding 200*l.* *per Ann.* for raising Portions for younger Children, *viz.* to the eldest of the younger Sons 1000 *l.* and 500 *l.* a-piece for every other younger Son, and so for the Daughters, to be paid at such Time as the Trustees in their Discretion should appoint for their better Maintenance and Preferment; the Father limits a Term accordingly, and dies, leaving two Sons and two Daughters; the youngest Son is put out to a Sea Captain, and dies at seventeen, the Trustees having made no Appointment for Payment of his Portion, the Daughters attained 21, and the Trustees appointed their Portions to be paid, which was done accordingly; and they likewise insisted on having a Share of the youngest Brother's Portion.

The eldest Son brought this Bill to have the Term assigned to him, his Brother being dead before he had Occasion for his Portion, and before any Appointment by the Trustees, and therefore it ought to sink in the Inheritance for his Benefit.

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The Master of the *Rolls* was of the same Opinion, and decreed the Term to be assigned the Plaintiff, but it was agreed all the Children were to be maintained out of the Trust Estate, they having no Maintenance appointed in the mean Time, and what had been employed for putting out the younger Son to go out of the Trust Estate.

Case 176. *Attorney General*, at the Relation of *Hindley* versus *Sudell*, *Heskith* and *Scarsbrick*.

A. mortgages a Manor (to which an Advowson was appendant) in Fee to *B.* then *A.* presents *C.* by Symony; and *C.* being for that Reason refused by the Bishop, *A.* presents *D.* who is admitted, &c. but after resigns, and is again presented by *A.* and *B.* the Relator having got an Assignment of the King's Title for the Symony, brings his *Q. Impedit* and a Bill in this Court, that the Mortgage may not be set up, nor given in Evidence against him at Law, and decreed accordingly.

THE Defendant *Heskith*, seised of a Manor with an Advowson appendant, makes a Mortgage of the said Manor in Fee (which Mortgage after came to the Defendant *Scarsbrick*) then he presented one *B.* by Symony, and *B.* was for that Reason refused by the Bishop; then he presented the Defendant *Sudell*, and he was instituted and inducted.

The Relator *Hindley* being informed of *B*'s Symony, applied for the King's Title; but before he had got it, *Sudell* resigned, and was again presented by *Heskith* and *Scarsbrick*.

The Plaintiff brought a *Qua. Imp.* and also this Bill, to discover if it was not agreed; that notwithstanding the Mortgage, the Mortgagor should present, and to be relieved; and that the Mortgage might not be given in Evidence at Law.

As to the Discovery of the Symony which the Bill sought, the Defendants demurred, and it was allowed by the Court.

But as to the other Matters, it was urged for the Relator, that if this Court will not assist, the Statute of Symony will signify nothing; and that this Court helps

the King to an Equity of Redemption, being entitled by Forfeiture for Treason; it was likewise urged, that the Mortgagee is but a Trustee for the Mortgagor; and in this Case the Mortgagee joined with the Mortgagor, which shews he did not do it as insisting on his own Right: And the Policy of the Law is, that one who has been guilty of Symony, shall not be admitted to present again. A Mortgage here is considered only as a Security for Money; now the Mortgagees Money is never the better secured, and 'tis a Thing not saleable, and therefore the Mortgagee is not to have the Presentation; and all that is sought is but to remove an Impediment to try a Title.

On the other Side 'twas said, the Mortgagee is not a Trustee in this Matter, especially the Mortgagee being in Possession; that an Advowson is valuable, and comprehended within the Mortgage, and may be sold; and this is a Penal Law, and not to be aided in this Court.

Lord *Keeper*. I consider what will be the Consequence both Ways, and if this Practice be not avoided, 'twill in a great Measure avoid the Laws against Symony, for this will lead to the Case of Trustees; and it being a constant Rule here, that *Cestui que Trust* shall have the Benefit of the Thing, if he be to have it, to all Intents, but to forfeit; then the corrupt Patron shall present by his Trustee, which is contrary to the plain Intention of the Act; and tho' this be called a penal Law, yet this Court will aid remedial Laws, not by making them more penal, but to let them have their Course, and the Law knows nothing of a Trust; and therefore this Court will take Care that its own Notions shall not be made Use of to elude so good and beneficial a Law; and decreed the Title not to be set up.

DE
Termino Paschæ,
1703.
In Curia Cancellariæ.

Case 177.

Sir *John Packington* versus *Barrow*.

If a Fine be gained by Fraud from a Feme Covert under Age, who dies, and her Heir buys in a prior Mortgage, and then levies a Fine, and five Years pass, and then those who claim under the Fine, bring a Bill to redeem, &c. Equity will not assist them claiming under such fraudulent Title, and also by Reason of the Fine and Non-claim.

SIR *Herbert Parrott* had Issue *Herbert Parrott*, his Son and Heir by his first Wife, and by his second he had Issue a Daughter, who was married to the Plaintiff Sir *John Packington*. *Herbert Parrott* married a young Heiress, and by indirect Means procured her to levy a Fine of her Inheritance when she was under Age; and Sir *Herbert Parrott* his Father was one of the Commissioners who took the Fine; and the Uses of the Fine were declared to be to her and her Husband, and the Heirs of their two Bodies, Remainder to the Heirs of the Survivor.

She afterwards died in her Minority without Issue, and her Husband survived her, and made a Mortgage of the Premisses, or Part of them, to Mr. *Vanaker*, and died without Issue, and the Land descended to *James Parrott* his Uncle, and from him to Sir *Herbert Parrot* his elder Brother, and from him to his Daughter the Wife of the Plaintiff Sir *John Packington*; but the Defendant *Barrow*, who was Heir at Law to Mrs. *Parrott*, who had levied the Fine, had purchased in *Vanaker*'s Mortgage, and

got into Poſſeſſion, and levied a Fine, and five Years paſſed, and the Deed declaring the Uſes of the Fine that was levied by Mr. *Parrott* and his Wife, was loſt.

Sir *John Packington* and his. Wife, who were intitled under this Deed and Fine, brought this Bill to have a Diſcovery of the Deed, and a Redemption of the Mortgage.

The Defendant pleaded the ill Practices in obtaining the Fine, and alſo his own Fine and Non-claim, and that there was no ſuch Deed as the Plaintiff ſought a Diſcovery of; or if there was, it was obtained by Fraud.

On arguing the Plea, the Benefit of it was ſaved to the Hearing; and now the Cauſe coming on to be heard, the Plaintiff having proved ſuch Deed to be executed, and the Subſtance of it, wou'd have it preſumed to be in the Defendant's Cuſtody, becauſe he had purchaſed in the Mortgage, and the Mortgagee cou'd have no good Title without it, and prayed that the Mortgage might not be ſet up againſt them.

The Defendant alledged, that the Plaintiff had not proved that the Defendant had the ſaid Deed, or purchaſed in the ſaid Mortgage, or that there was any Mortgage at all, or if there were, it was but of Part of the Lands, and therefore would not hinder their going to Law, and ſaid, that the Fine levied by the Defendant, and Non-claim, made a good Title at Law to him; or however, that this Court wou'd not aſſiſt the Plaintiff, who claimed under a Fine ſo ill obtained; and the rather for that the Plaintiffs were Volunteers without any Agreement previous to the Marriage of the ſaid Feme Covert to ſettle her Eſtate.

'Twas replied, that no Doubt there was ſuch a Mortgage, elſe the Defendants need not oppoſe an Order that it ſhould not be ſet up at Law; that the Defendants were no Purchaſors; and tho' the Court will not perhaps aid an ineffectual voluntary Conveyance, yet if the Conveyance be good, the Court will aſſiſt it to have all the Conſequence of a Conveyance.

Curia. The Defendant insists there was no such Deed; or if there was, it was obtained by Practice, and also on a Fine and Non-claim, and Sir *Herbert*, in taking the Fine from his Daughter in Law, could not have been assisted here, and the Plaintiffs claim under him. All Titles at Law that are not directly against Conscience, shall be assisted here to a Redemption; and if there were only a Blemish in the Title, so should the Plaintiffs, but I cannot get over the Fine and Non-claim; the Plea is good, dismiss the Bill.

Case 178.

Bushnell versus *Parsons*.

A. makes a Lease to *B.* (his Wife's Nephew) for 21 Years, for Payment of his Debts and Legacies, and at the same Time by Will taking Notice of the said Lease, devises the Lands after the Expiration of the said Lease to *C.* his Nephew and Heir, and makes *B.* Executor. *A.* lives twelve Years, and pays all his Debts himself; and the Personal Estate was sufficient for the Legacies. *C.* brings his Bill to have the Lease delivered up, the Trusts being performed, but dismiss'd, the Reversion only after the Expiration of the Term being devised to him.

JOhn Bushnell being indebted, makes a Lease for 21 Years to the Defendant (his Wife's Nephew) in Trust for Payment of his Debts and Legacies, and at the same Time made his Will, and thereby reciting, that he had so made a Lease for Payment of his Debts and Legacies, devises the Lands after the Expiration of the said Lease to the Plaintiff (who was his Nephew and Heir) and made the Defendant Executor.

The Testator lived twelve Years after the making this Lease and Will, and paid all his Debts himself, and left Personal Estate more than sufficient to pay his Legacies.

The Plaintiff brought this Bill for an Account of the Profits, and to have the Lease delivered up, the Trusts for which it was made being performed.

The Defendant by Answer insisted, that the Testator intended he should have the Benefit of this Lease, and had one Witness that swore, that on the Defendant's Treaty of Marriage with his Wife, the Testator, to promote it, said, he had settled a Lease for 21 Years on him.

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My Lord *Keeper* put the Caſe of a Deviſe of a Legacy to a Mother for Maintenance of her Child; tho' the Child die, the Mother ſhall have the Legacy, and thought the Defendant's Proof ſufficient to rebutt the Plaintiff's Equity, if he had any, which he thought he had not, the Reverſion only being deviſed after the Expiration of the Leaſe, and ſaid it did not differ from the Caſe of *Crompton* verſus *North*.

Angell verſus *Smith*.

Caſe 179.

Where the Plaintiff a *Pauper* had a Decree for the Duty and Coſts, and the Maſter taxed full Coſts; yet on Motion, ordered Plaintiff and his Solicitor to make Oath before a Maſter of what they had paid or were to pay, and that to be allow'd, but no further.

THE Plaintiff brought a Bill in *formâ pauperis*, and had a Decree to recover the Duty with Coſts; the Maſter taxes Coſts as uſual for Perſons not *Paupers*.

Defendant moves, that he may tax only *Pauper* Coſts, and ſaid it was unreaſonable the Plaintiff ſhould have more Coſts than he was out of Pocket; that it wou'd encourage *Paupers* to be vexatious to be aſſured if the Cauſe went againſt them, they ſhould pay no Coſts; and if for them, ſhould recover not only the Thing in Demand, but a good Sum of Money too, which they never expended; and cited the Caſe of *Harvey* verſus *Tuder*, 22 *December*, 9 *W.* 3. where the Plaintiff, who was a *Pauper*, having obtained a Decree with Coſts, and the Maſter having taxed Coſts as uſual, on Exceptions to the Maſter's Report, for that Cauſe the *Chancellor* allowed only *Pauper* Coſts.

On the other Side it was ſaid, that the Council, Clerks and Solicitors gave their Labour to the *Pauper* out of Charity, and not to his Adverſary, and therefore he ought to have Coſts as others, where the Decree is for Coſts generally; though the Court may, if they find him vexatious, order *Pauper* Coſts only, but that is by Special Order, in Caſes of Contempts, inſufficient An-

3 ſwers,

ſwers, &c. but where Coſts are ſtated, and of Courſe he is to have the ſame as thoſe that are not *Paupers*, and cited the Caſe of *Hautton* verſus *Hager*, where the Plaintiff a *Pauper* had a Decree with Coſts, and the uſual Coſts were taxed; and on Petition that it might be *Pauper* Coſts only, the Lord *Sommers* would not allow it.

My Lord *Keeper* ſaid, 'twas unreaſonable any one ſhould have more Coſts than out of Pocket, and ordered the Plaintiff and his Solicitor to make Oath before the Maſter; and what they ſwore they had paid or were to pay, was to be allowed, but no further.

DE
Term. S. Trinitatis,
1703.
In Curia Cancellariæ.

Langdon Executor of *Dickenſon* verſus *African Company* and *Dockwray*.

Caſe 180.

Where one recovered in Trover againſt a Servant of the *African* Company, Equity would not relieve, becauſe Plaintiff in Equity might at Law have defended himſelf; but decreed that the Company ſhould indemnify the Servant, and that the Plaintiff at Law (one of the Defendants in Equity) might proſecute the Decree in the Servants Name.

IN 1676 the Plaintiff's Teſtator being Commander of the Ship *Hunter*, ſent by the King (at the Inſtance and Charges of the *African* Company, to whom the King had granted the ſole Trade on the Coaſts of *Guinea*, excluſive of all others) to ſeize all Interlopers in *Africa*.

Accordingly in 1677, he ſeizes the Ship *Anne* (whereof the Defendant *Dockwray* was Freighter) trading in *Africa*, and ſhe was condemned as a Prize in *Africa*, and her Cargo accounted for to the *African* Company.

In 1696, the Defendant *Dockwray* brought Trover and Converſion againſt the Plaintiff's Teſtator, and recovered 2500*l.* Damages for the ſaid Ship and Cargo.

This Bill was brought to be relieved againſt it, but was diſmiſs'd as againſt the Defendant *Dockwray*.

But as against the Company it was decreed they should indemnify *Dickenson*, and that the Defendant *Dockwray* might prosecute the Decree in *Dickenson*'s Name; and tho' *Dickenson* had received 700 *l.* from the Company for that Service out of the said Cargo, he was not to refund or abate that, because it was only a Gratuity to him; he acting only as a Servant or Agent to them, and as to the *Quantum* of the Damage they were bound by the Recovery against *Dickenson*, because they might have defended the Trial; and this was said to be in the Nature of an interpleading Bill.

Case 181.

Rawston versus *Reading*.

A Case was ordered to be stated, and was this; *William Lane* had Issue only two Daughters, one whereof was dead; and left Issue *Lane Bernard* her Heir, and one of the Co-heirs of the said *William Lane*. *William* by Will devises the Estate to *Lane Bernard* and his Heirs; and if he should take one Moiety by Descent, and the other by Purchase, or the whole by Purchase was the Question; and it was adjudged he took the whole by Purchase.

DE

Termino S. Mich.

1703.

In Curia Cancellariæ.

Webster versus *Bishop* & al'.

Case 182.
2 Vern. 444.
S. C.
One of the Parties to an Award made on a Submission in Court pursuant to the late Act of Parliament, dies before the Money paid, no *Sci. Fa.* can issue against his Heir or Executor to inforce Payment for the Award, tho' established by the Court, is not in Nature of Judgment, or Decree to be prosecuted, but in Nature of a Contempt, which dies with the Person, and so held all the Judges.

PLaintiff and Defendant's Testator had submitted to an Award by Order of this Court, and the Testator was awarded to pay a Sum of Money, and an Attachment went against him pursuant to the late Act for Non-payment of the Money awarded (the Ward having been controverted here by Affidavits, pursuant to the said Acts, and established by the Court) but he dying before any farther Proceedings, a *Sci. Fa.* was now pray'd against the Heir and Executor, to shew Cause why they should not pay the Money.

'Twas urged, that it will not lye, because there is no Cause in Court, and the Statute says only, it shall be prosecuted as in Case of a Contempt in other Cases, and a Contempt dies with the Person.

On the other Side, 'twas said, that this was in Nature of a Judgment or Decree, and the Executors might be brought in to pay it, if they had Assets; but because this concerned all the Courts as well as this, the Judges were consulted in it, who all were of Opinion, that the Prosecution

tion determin'd by the Death of the Party, and could not be revived or carried on farther.

Case 183.

Staplehill & Ux' versus *Bully*.

A Limitation to a second Son in Remainder in Tail on a Settlement made on the Marriage of the first Son, and in Consideration of the Wife's Portion, makes not the second Son a Purchasor.

A. The Father, having Issue *B.* and *C.* his Sons, on the Marriage of *B.* covenants before the End of *Easter* Term, then next following to levy a Fine to the Use of *B.* and the Heirs of his Body, Remainder to the Use of *C.* and the Heirs of his Body, Remainder to *A.* in Tail, Remainder to him in Fee.

The Fine was levied as of *Easter* Term, but the Marriage being put off till after *Easter* Term, the Deed was not dated till after, neither so, the Fine was levied before the Date of the Deed, and by Consequence, the said Deed was no Declaration of the Uses of that Fine.

The Father died, and then *B.* dies, leaving Issue *William*, and *William* being Sick, and having borrowed some Money of the Defendant, who was his Brother-in-Law, made him a Lease for 99 Years, if three Lives so long Live, under a Proviso, to redeem on Payment of what due, and within a few Days after dies without Issue.

C. claimed the Lands, by Virtue of the Marriage Settlement, and brought an Ejectment, but could not prevail, by Reason of the said Defect before mentioned; and so he brought this Bill to have the Settlement made Good, and the Defendant's Lease set aside.

But because the Limitation in Remainder to him was voluntary (the Consideration of *B*'s Marriage not extending to it) and the Settlement not good, *C.* was but an Equitable Remainder-Man in Tail at best, and *William*, who made the Lease to the Defendant, was also Tenant in Tail, in Equity, and might, by any Conveyance bar the Settlement; therefore the Plaintiff must Redeem on the Terms in the Lease; for any Conveyance by Tenant in Tail, in Equity is good, and decreed accordingly.

Attorney General, at the Relation of the Parishioners of St. *Clements Danes* versus Lady *Hart* & al'.

Case 184. *Novemb.* 9.

Lands of 8 *l.* *per Ann.* purchased by a Parish in Trust for Charitable Uses, by Building, &c. improve to 450 *l.* *per Ann.* and the Trustees by Order of the Vestry for 1000 *l.* for the Use of the Parish, make this Estate a Security for 100 *l.* *per Annum* Annuity, and the Parishioners would set aside this Agreement as a Breach of their Charity, but their Bill dismiss'd.

THE 5th of *Ed.* 6. one *William Burton*, in Consideration of 160 *l.* conveys a Messuage, call'd the *Slaughter-House* in *High-Holbourn*, then in Lease at 8 *l.* *per Ann.* to several Persons in Fee, in Trust, to apply the Profits for Maintenance of 12 Men of the Parish, who had been Church-Wardens; and that when the Number of Trustees were reduced to four or three, they to fill up the Number.

After, by Building, &c. the Rent of the Premisses was increased to 450 *l.* *per Ann.* and employ'd in Augmentation of the Charity.

19 *July* 1682, a new Feoffment was made to other Persons, and the Charity expressed in the Deed in the same Manner, as in the first Deed only, that here 'twas expressed to be for the Poor in general, without confining it to the Number of 12.

The Trustees, by Order of the Vestry, for 1000 *l.* paid for the Use of the Parish, devise Part of the Premisses to some of the Defendants for 99 Years, if the Lady *Hart*, so long live, under a Proviso, to be void, on Payment of 100 *l.* *per Ann.* to her, during so many Years of the said Term as she should live, and in the Deed, 'tis mention'd, that the Premisses were conveyed to the Grantors by Deed 19th *July* 1682

This Bill was now brought to set aside this Deed of Annuity, as being made in Breach of the Charity, and so already decreed by the Commissioners of the Charitable Uses, and by them set aside.

The Defendants insisted, they had a good Title at Law, and were Purchasors for valuable Consideration, and the Money paid for the Benefit of the Parish, and no express Notice of the Trust was made out, but only by a Recital; and, however, the Land was at first a Parish Purchase, and the Profits not above 8 *l.* *per Ann.* 'tis to be presumed the Parish at their Charges improved it to 450 *l.* and therefore have the disposal *pro tanto*; and the Parishioners from Time to Time have made Leases on Fines, and employ'd the Money to pay Parish Debts; and if this be set aside, all must, and 'twill be no Benefit to the Poor, and all above the Maintenance of 12, they may dispose of to any other like Uses.

The Lord *Keeper* seemed clear to dismiss the Bill; but after, the Plaintiffs submitted to pay the Arrears, and growing Payments, and so 'twas decreed, and Costs spared.

Case 185.

Cason & al' versus *Round* & al'.

Notice must be denied positively, not evasively.

CASON had a Mortgage of certain Lands, whereof the Defendant had a Prior Mortgage, and afterwards lent a further Sum to the Mortgagor on a Statute; but as the Plaintiff alledged, the Defendant had Notice of the Plaintiff's Mortgage before the last Money lent. Defendant by Answer did not deny Notice positively, but evasively; and the Plaintiff could not prove Notice, till after the lending the last Money; yet, because the Defendant had not deny'd Notice positively, Lord *Keeper* and Master of the *Rolls* decreed a Redemption, on Payment of the first Money only.

Case 186.

Ashton versus *Ashton*.

ONE devises his Real and Personal Estate to make up the Portions, provided for his Daughters by his Marriage Settlement 3000 *l.* a-piece, provided they marry with the Consent of their Mother and Brother,

and if without ſuch Conſent, then to be applied to other Purpoſes.

Lord *Keeper* and Maſter of the *Rolls* held this a ſubſequent Condition, and that the additional Portions are payable at the ſame Time with the Portions provided by the Settlement, which was 18, or Marriage; and therefore decreed the Lands to be ſold to the beſt Purchaſor, and the Money to be brought before the Maſter, and Intereſt paid the Daughters from their reſpective Ages of 18 Years, and the Principal at 21, if they were then married with ſuch Conſent; and if not then married, they to give their own Recogniſance to repay for the Purpoſes in the Will; if they after marry without ſuch Conſent, and the Court declared they could not diſpenſe with the Forfeiture, nor alter the Will.

DE
Termino S. Hillarii,
1703.
In Curia Cancellariæ.

Case 187. **Sir *George Chidley* & Ux' versus *Lee*.**

A Legacy of 150 *l.* given by a Collateral Ancestor to the Daughter of *A.* which was paid *A.* and who after gave her 1000 *l.* Portion, settled a Church Lease on her, and maintained her and her Husband 14 Years; yet held no Satisfaction.

MR. *Lee* was Father to the Plaintiff's Wife, and had in his Hands a Legacy of 150 *l.* which had been given her by a Collateral Anceftor.

On her Marriage with the Plaintiff, the Defendant her Father gives her 1000 *l.* Portion, and after settles a Church Lease on the Plaintiffs, and maintained them 14 or 15 Years at his own House, and no Notice was ever taken of the Legacy, nor for ought appeared did the Husband know any Thing of it; yet after some difference between them, and a Bill brought, the Legacy was decreed with Interest and Costs; and the Master of the *Rolls* said, he could not discharge it, tho' he disliked the Suit.

Case 188. ***Woolnough* versus *Woolnough*.**

A Devise by *Cestui que Trust* in Tail sufficient to bar the Intail.

IN this Case, my Lord *Keeper* declared, that a Devise by *Cesti que Trust* in Tail in Trust, is good without any farther Act to bar the Intail in Tail.

DE

Termino Paſchæ,

1704.

In Curia Cancellariæ.

Sir *Richard Leving* verſus Lady *Caverly* & al'. Caſe 189.

'TWAS agreed *per Cur.* that the Anſwer of a Superannuated Defendant put in by Guardian, is to be read againſt him, as an Anſwer of one of full Age put in in Perſon; and a Difference was taken between ſuch an Anſwer and that of an Infant put in by Guardian; becauſe an Infant improves and mends, as my Lord *Keeper* ſaid, and therefore is to have a Day, to ſhew Cauſe after he comes of Age; but the other grows worſe, and is to have no Day.

The Anſwer of a ſuperannuated Perſon put in by Guardian, ſhall be read againſt him, as an Anſwer of one of full Age; *ſecus* of an Infant, who is to have a Day to ſhew Cauſe.

Hodgſon verſus *Hitch* & al'. Caſe 190.

A Man makes his Will, and thereby deviſes part of his Real Eſtate to *B.* (who was his Heir at Law) paying 100 *l.* which he owed on Bond to *Steel*, and deviſed the Surplus of his Perſonal Eſtate to the Plaintiff, who brought this Bill, and ſuggeſted, that the Teſtator did not owe any Money to *Steel*; but the 100 *l.* meant by that Deviſe, was 100 *l.* he owed by Bond to *Grace Beck*, then married to the Defendant; and that the Teſtator

Parol Evidence admitted to aſcertain the Perſon, the Teſtator intended ſhould take a Legacy.

Testator knew her to be married; but forgetting her Husband's Name, call'd him *Steel* instead of *Hitch*, and this being proved by the Person, who drew the Will, and another, the Payment was decreed accordingly.

DE

Term. S. Trinitatis,

1704.

In Curia Cancellariæ.

Case 191.

Le Clea versus *Trot.*

A Surety in a *Ne exeat Regnum* could not be discharged after Answer put in by the Defendant, nor even after Decree against the Defendant, and Commitment for 19000 *l.* decreed against him, for if (as urged) there is no Danger of Defendant's going beyond Sea (being in Prison) then the Surety is in no Danger.

A *Ne exeat Regnum*, having been awarded against the Defendant, *J. S.* (who was the now Petitioner) became his Surety to the Sheriff; after Answer put in, *J. S.* petitions to be discharged, but was deny'd; then the Cause was heard, and 19000 *l.* decreed against the Defendant, and he committed for Non-Payment; and then *J. S.* petitions again to be discharged, because being a *Manucaptor*, and the Party in Prison, there can be no Danger of his going beyond Sea.

Lord *Keeper.* If so, then his Surety is in no Danger, and would not discharge him.

Griffith verſus *Rogers*.

Caſe 192.

THE Defendant's Husband, by Will (*inter alia*) deviſed his Library of Books to *A.* (except 10 Books, ſuch as his Wife ſhould chooſe, as Plays, Romances, Sermons, but not Law Books) and made her Executrix; and the Queſtion was, Whether this was ſuch a Deviſe to the Wife as would exclude her from the Benefit of the Perſonal Eſtate, as Executrix.

A Husband deviſes his Library of Books to *A.* except 10 Books, ſuch as his Wife ſhould chuſe, and made her Executrix, this Exception of the 10 Books held not ſuch a deviſe to the Wife, as ſhould exclude her from the Surplus.

Per curiam not, and my Lord *Keeper* ſaid, 'tis no deviſe of the 10 Books to her, but only an Exception of 10 out of the Deviſe to *A.* and the Executrix was the proper Perſon to chooſe which ſhould be excepted, and it could not be thought he intended to bar his Wife of the the Benefit of the Executorſhip by ſo inconſiderable a Deviſe.

DE
Termino S. Mich.
1704.
In Curia Cancellariæ.

Case 193. **Lassells versus Lord Cornwallis.**

A. on his Marriage creates a Term in Trust to raise 6000 l. of which 3000 l. was for his younger Children, and the other 3000 l. as he should appoint; after, he appoints the 3000 l. as a Collateral Security to J. S. and by Will devises it and the other 3000 l. to his Daughter, yet held that it should be Assets to satisfy a Bond Creditor.

THE Defendant's Father on his Marriage Settlement, created a Term for 500 Years, in Trust, to raise any Sum not exceeding 6000 *l.* *viz.* any Sum not exceeding 3000 *l.* for younger Children, and any farther Sum not exceeding 3000 *l.* for such Purposes as he should think fit; and after, appoints the last Sum to be Collateral Security to Sir *Stephen Fox*, for his quiet Enjoyment of an Estate he had sold him, on which there was some Doubt of the Title; and after, by Will, appoints the 3000 *l.* subject to Sir *Stephen*'s Collateral Security, and also the other 3000 *l.* for his Daughter, by the Dutchess of *Monmouth.*

The Plaintiff, a Bond Creditor, brings his Bill to have his Debt out of the 3000 *l.* subject to Sir *Stephen*'s Indemnity, that being a voluntary Gift, as to the Daughter, and not to prevail against him; and that the Will was a Devise, not a farther Appointment, for there was a compleat Appointment before, tho' not a Disposition of the whole 3000 *l.*

My Lord Keeper decreed the 3000 *l.* subject to Sir *Stephen Fox*'s Indemnity to be liable to the Creditors, because he had a resulting Equity in it, which he might devise, but not to take Place of Creditors, and he had before made an Appointment, which satisfy'd his Power.

Barstow versus *Palmes* & al'.

Case 194.

'TWAS held by my Lord *Keeper*, that where on a Bill brought by *A.* against *B. C.* and *D.* and others, the Defendants had examined some Witnesses, that *B.* being now Plaintiff, may read those Depositions against the Plaintiff, or any of the Defendants in the first Cause.

Kent versus *Bridgman*.

Case 195.

A Matter examinable and already determined at Law, yet Equity may give Relief in it.

A. Recovers a Judgment against the Defendant's Father, and the Plaintiff (the Sheriff's Bailiff) levied 24 *l.* of Goods in the Possession of the Defendant's Father, the Defendant brought Trover against the Plaintiff, pretending the Goods were his, because the Landlord had seised them for Rent, and sold them to him; but on Evidence, the Sale was proved Fraudulent, and that the Father was in Possession all along, and paid Taxes for the Farm and Goods, *&c.* and therefore the Judge gave Directions to the Jury to find for the Defendant at Law; but because he had not proved a Copy of the Judgment, as it was held he ought, for that only Reason the Jury found against him, and now he brought this Bill for Relief, and a Demurrer to it on arguing was over-ruled; then by Answer he insisted on his Property under the Bill of Sale, and Recovery at Law, where the Matter is properly triable and relied on that, without examining any Witnesses; but the Plaintiff fully proved his Case as before, and that the Judge altered his Directions only for Want of Proof of the Judgment, and disproved the

Defendant's Anſwer in ſome Particulars, and a perpetual Injunction was granted againſt the Judgment, and the Defendant to pay Coſts; for tho' it were examinable at Law, ſo it was in Equity too, and the Plaintiff having ſet out the whole Matter, and proved it to be true, if it were untrue, the Defendant might have diſproved it.

Caſe 196.

Callow verſus *Mince*.

A Witneſs incompetent being intereſted, may on a Releaſe given him, whereby he becomes diſintereſted, be examined again: So a Witneſs at the hearing rejected to be read, becauſe intereſted; yet on a Releaſe given was examined again on the Account, and allowed good on Exceptions to a Maſter's Report.

THE Plaintiff examined a Witneſs before the Hearing, who was then intereſted, and therefore refuſed to be read; at the Hearing the Cauſe, the Plaintiff was decreed to account, and then he gave a Releaſe to the Witneſs, and examined her over again to the ſame Matter without Order of the Court; and on Exception to the Maſter's Report, and offering to read the ſaid Witneſs, the Defendant objected, that having been examined when ſhe was not indifferent, ſhe could never be made an indifferent Witneſs, becauſe Oath would always be a Chain and Byaſs upon her; beſides, no Witneſs ought to be twice examined to the ſame Matter, without ſpecial Order of the Court, to which it was anſwer'd, then the Defendant ought to have moved to ſuppreſs the Depoſition for want of an Order to examine her, but could not object it, when the Depoſition came to be read; and as to the firſt Part of the Objection, it was ſaid, at Law, if I examine a Witneſs at a Trial, who is incompetent, and after give him a Releaſe, he may be examined again; ſo here.

My Lord *Keeper* was of Opinion for the Plaintiff, in both, and ſo the Witneſs was read and prevailed.

DE Termino S. Hillarii, 1704.

In Curia Cancellariæ.

Clavering versus *Clavering*. Case 197.

A Father in 1684, makes a voluntary Settlement on his eldest Son, and his Heirs, without any Power of Revocation; after he makes another Settlement of the same Lands to his second Son, for Life, with Remainder to his first and other Sons in Tail Male, and dies. The first Deed after his Death came to the Hands of his eldest Son's Heir; and the other Deed to the Hands of the second Son, who brought a Bill to set aside the first.

A Father in 1684 makes a voluntary Settlement on his eldest Son and his Heirs, without any Power of Revocation, and after made another Settlement of the same Lands to his second Son for Life, with Remainder to his first, and other Sons in Tail Male, and dies. The first Deed comes to the Heir of the eldest Son, and the other to the second Son, who brought a Bill to set aside the first; but *per Cur.* both Deeds being voluntary, the Provision for a younger Son is no such Consideration, as to induce the Court to set aside the first Deed.

My Lord *Keeper* cited Lady *Hudson*'s Case, where a Father on a Quarrel with his eldest Son, made a Settlement on his Wife of 100 *l. per Ann.* in Augmentation of her Jointure, and after being reconciled to his Son, cancelled the said Deed, and so 'twas found at his Death; and on a Trial at Law the Deed being proved to have been executed, was adjudged good, tho' cancelled, and the Son on a Bill brought here, was dismissed by my Lord *Somers*.

Dobyns

Dobyns ſaid, this Court goes on Preſumptions in Family Settlements; and if one gives a Daughter 1000 *l.* Legacy, and after on Marriage gives her 1000 *l.* Portion, this ſhall here be a Satisfaction of the Legacy; ſo if one owes his Child a Sum of Money, and by Will gives him a greater, this ſhall be here taken for Satisfaction.

Atkinſon verſus *Webb.*

Caſe 198.
2 Vern. 478. S. C.
A. gives Bond to *B.* of 300 *l.* conditioned to pay 20 *l. per Ann.* for Life quarterly, without any Deduction, the like Annuity of 20 *l. per Ann.* afterwards given by *A.* by Will to *B.* payable half-yearly, and without ſuch Deduction, held no Satisfaction.

THE Plaintiff having ſerved the Lady *Pratt* 25 Years, as Chamber-Maid and Woman, and being much in her Favour, and married to the Plaintiff by her Encouragement; the ſaid Lady gives her a Bond of 300 *l.* conditioned to pay her and her Husband 20 *l.* *per Ann.* during their Lives, and the Life of the longer Liver of them, payable Quarterly, at Sir *Francis Child*'s Shop, free from all Deductions; and this was conſtantly paid.

About five Years after, the ſaid Lady by Will deviſes ſeveral Annuities to ſeveral Perſons, in Satisfaction of the like Annuities ſecured to them by Bond, and gives 20 *l.* *per Ann.* to the Plaintiff, to be paid half-yearly at the ſaid Lady's Manſion Houſe, chargeable on ſuch Lands; but takes no Notice of the 20 *l. per Ann.* ſecured to her by Bond.

On the Circumſtances of this Caſe, the Court decreed her both, for that given by the Will was not ſo Advantageous to the Plaintiff as the other, one being to be paid quarterly, the other half-yearly; the one here, the other on the Land; one free from all Deductions, the other being out of Land will be liable to Taxes; and a Deviſe implies a Bounty, and thoſe that were intended in Satisfaction of the like Annuities are ſo declared in the Will, which this is not.

Acton versus *Acton*.

Case 199.

THE Plaintiff's Husband before Marriage gives her a Bond to leave her 1000 *l.* if she survived him, and the same Day marries her, and some Years after dies Intestate, leaving a Freehold and Copyhold Estate all in Mortgage.

A Man before Marriage gives Bond to the Woman to leave her 1000 *l.* if she Survives him, and then marries her, and dies Intestate, and his Estate both Free and Copyhold, being all in Mortgage, she takes out Administration, and on Bill against the Heir and Mortgagee was let into a Redemption of the whole, tho' the Bond was released and gone at Law by the Intermarriage, and tho' the Copyhold not affected by the Bond, it being in Nature of a Marriage Agreement.

The Plaintiff takes out Administration, but the Personal Estate not being near sufficient to satisfy the said Bond, she brings her Bill against the Heir and Mortgagee to redeem, and be let in to have Satisfaction of the said Bond.

The Defendant the Heir urged, that by the Marriage the Bond became void in Law, and could not be maintained here, especially against him, who is chargeable only in such Case, by being specially named; and tho' it would be supported as a Marriage Agreement in Writing, yet could only charge the Personal Estate; and that, however, it cannot affect the Copyhold.

On the other Side, 'twas said, this was once a good Bond, and the Heirs are bound in it; and tho' by the Marriage it lost its Force in Point of Law, yet in Equity it will have the same Force as before, and bind the Husband, and entitle the Plaintiff to a Redemption; as if the Obligee loses his Bond, yet Equity will set it up, and give him the same Advantage of it, as if it were in Being; and if Equity does support it, it must support it, not only as an Agreement in Writing, but as a Bond; and therefore the Plaintiff ought to have the Redemption as a Bond Creditor would have had; and tho', 'twas agreed, 'twould not entitle her to redeem the Copyhold, if mortgaged by itself; yet when that and the Freehold are

mortgaged together, ſhe muſt redeem the whole, and cannot redeem by Parcels ; and tho' the Heir on Payment of what is due on the Mortgage will have back the Copyhold from us, yet we ſhall hold the Freehold till ſatisfied the Bond.

Lord *Keeper* ſaid, if the Bond were executed (which being doubtful, was ordered to be tried) the Court would ſupport it as a Bond, and that the Freehold and Copyhold being mortgaged together, the Plaintiff ſhould redeem both.

DE

Termino Paſchæ,

1705.

In CURIA CANCELLARIÆ.

Lord *Rockingham* and *Arabella Oxendon* verſus Sir *James Oxendon*.

Caſe 260.

BY Articles on the Marriage of the Plaintiff, the Lady *Oxendon*, with the Defendant, 6000 *l.* part of her Fortune was to be laid out in Lands, and ſettled to him for Life, then to her for Life, *&c.* and was left in the Bank till the Purchaſe could be made ſubject to the ſaid Truſt.

By Articles of Marriage 6000 *l.* of the Wife's Portion, was to be laid out in a Purchaſe of Lands to be ſettled on the Huſband for Life, then on the Wife for Life, and to lye in the *Bank* till the Purchaſe made; before that made, the Wife by the Uſage of her Husband, being forced to leave him, had the Intereſt of this Money allowed her in Nature of Alimony.

The Lady being after, by his cruel and unhandſome Uſage, forced to leave him, brought her Bill to have a Performance of the Articles, and a ſeparate Maintenance whilſt ſhe lived from him, which was oppoſed, and ſaid, that Alimony was only to be ſued for in the Spiritual Court, and to decree it here, would be to decree a Divorce.

On the other Side, 'twas ſaid, that the Spiritual Court has no original and proper Juriſdiction of Alimony, but only incidentally, and conſequentially when they hold

Plea

Plea of Divorce, whereof they have proper Jurisdiction; and if it had, yet the Chancery has a concurrent Jurisdiction, as with the Admiralty and other Courts in Cases peculiar to their Jurisdiction, and to decree Alimony, here is not to decree a Separation; for if he thinks she left him without just Cause, he may sue in the Spiritual Court for Restitution of Conjugal Duties; and if he prevails, the separate Maintenance will cease.

My Lord *Keeper* and Master of the *Rolls* said, they would not declare where this Court would give separate Maintenance, and where not, but here being Trust Money, over which the Court has a Power, they decreed the 6000 *l.* to be laid out with the Lady's Consent in a Purchase, and settled pursuant to the Articles, and the Interest in the mean Time to be paid her so long as she lived separate.

Case 201.

Brown versus *Dawson.*

A Wife Parts with 14 *l. per Ann.* of her Jointure, and the Husband gives her a Note that his Executors should pay her that Sum during Life, and he after by Will gives her 14 *l. per Ann.* out of certain Lands for Life, held a Satisfaction of the Note.

HEnry *Dawson* had prevailed on his Wife to join in selling 7 *l.* 10 *s. per Ann.* of her Jointure, and after 6 *l.* 10 *s. per Ann.* more, and having given two several Notes, that his Executors should pay her the said two several Sums during Life; he after makes his Will, and thereby gives her 14 *l. per Ann.* during Life, out of certain Lands, and this was held *per Curiam* to be in Satisfaction of the Notes.

Lord

Lord *Dudley*, and *Ward* an Infant, by the Honourable *Thomas Newport* versus the Lady Dowager *Dudley*, &c. & econt'.

Case 202

A Dowress shall have the Trust of a satisfied Term removed against the Heir at Law.

THE Case is this, *Edward* Lord *Dudley* and *Ward* the Plaintiff's Great Grandfather, being seised in Fee of the Honour, Manor, Castle, and Borough of *Dudley* in *Com. Stafford*, and of an Estate in *Stafford*, and *Worcester* of a great yearly Value; by Lease and Release, dated 21st and 22d of *March* 1700, did, in Consideration of natural Love and Affection towards his Grandchild *Edward Ward*, Esquire (the Plaintiff's Father) Son and Heir of *William Ward*, eldest Son of the said Lord *Dudley*; *Frances Ward* and *William Ward*, Son and Daughter of *Ferdinando Dudley Ward*, second Son of the said Lord *Dudley Ward*; *Frances Porter* and *Catharine Porter*, Grandchildren to his Brother *William Ward*, Party to the Deed, and for raising Portions for them, and for settling his Lands in his Name and Blood; convey to *William Ward*, Senior, and *William Dilkes* Defendants, to the Use, *&c.* the said Lord *Edward*, the Great Grandfather for Life, and then to the Defendants *William Ward* and *Dilkes* for 99 Years, then to the said Lord *Dudley* the Great Grandfather and his Heirs Male of his Body, and for Default, *&c.* to *William Ward* and *Dilkes* for 100 Years; Remainder to the said *William Ward*, Senior, in Tail, Remainder to the right Heirs of the said *Edward* the Grandfather.

The Term for 99 Years was thereby declared to be in Trust, that *William Ward* and *Dilkes* should out of the Rents, Issues and Profits, *&c.* levy, raise, and pay 2000 *l.* for the Portion of *Frances*, payable at 18, and 50 *l.* yearly Maintenance, till the Portion paid; to raise, levy, and pay 300 *l.* a-piece to *Catharine* and *Frances Porter*, and Annuities of 120 *l.* a-piece to the Defendants *Ferdinando* and *William Ward*, junior, for their several

Lives; and 300 *l. per Ann.* to the Plaintiff's late Father, *Edward* Lord *Dudley*, for his Support and Maintenance, payable half-yearly, till the Expiration or Determination of the said Term. These Annuities to arise and begin to be paid after the Death of the said Lord *Dudley*; and that the Trustees should have all the Charges and Costs they should be at, paid them out of the Trust Estate.

Then follows this Clause. And may, shall, and will permit the Person and Persons, who from Time to Time shall have Right to the Freehold of the Premisses, by Virtue of, or under any Use herein before limited or declared from Time to Time, to have, receive, and take to his and their own Use and Benefit, the Residue of the Rents and Profits which shall remain over and above, or after the Performance of the said Trusts, &c.

Then follows a Proviso, That if the Person or Persons that shall have Right to the Freehold, &c. shall pay or deposite the 2000 *l.* or so much as shall be unlevied, &c. and shall, to the good liking of the Trustees, secure the Payment of the said several Annuities and Payments, then the Term to cease, determine, and be void.

The Master of the Rolls Argument and Resolution.

I need not mention the Trust of the Term for 100 Years, for the Augmentation of *Frances*'s Portion, being out of the Case, that being to arise upon Failure of Issue Male of the said Lord *Dudley* the Great Grandfather, nor the Power of Revocation to the said Lord *Edward Dudley*, for there was not any Revocation.

The Lord *Edward Dudley* the Grandfather made his Will, 28th of *June* 1701, and devised the Guardianship of the Plaintiff's Father, to the Defendant *William Ward*, senior, his Brother, and the Guardianship of *William Ward*, junior, and *Frances Ward*, the Defendants, to him and the Defendant *Hodgett*; and thereby gave several small Legacies, and gave all the Residue of his Personal Estate to the Plaintiff's Father (Lord *Edward Dudley*) and made him and Mr. *Hodgett* Executors; but Mr. *Hodgett* was to reap no Benefit thereof, and died 30th of

3 *August*

August 1701, that the Defendants *William Ward* and *Dilkes* enter'd on all the Trust Lands.

The Plaintiff's Father afterwards married the Lady *Diana*, the Plaintiff in the Cross Bill, and died 20th of *March* 1704, under Age, and left the Lady *enſient* with the Plaintiff, who is Son and Heir to his Father, and Heir at Law to his Grandfather, and as such is intitled to the Surplus of the Rents of the Trust Estate in Mr. *Ward* and Mr. *Dilkes*, and the Benefit of the Term for 99 Years.

The Lady *Diana*, after the Death of her Husband brought her Writ of Dower, to which the Term for 99 Years was pleaded in Bar; but she had Judgment in Dower with a *Cessat Executio* during the Term.

Edward Lord *Dudley* and *Ward* the Plaintiff's Father, made the Lord *Sommers* and the Lady *Diana Howard* Executors, until the Lady *Diana* attains her full Age, in Trust for her; the Lady *Diana Howard* has proved the Will, and also taken Administration *de bonis non* to *Edward* Lord *Dudley*, the Great Grandfather, with the Will annexed.

The great Question contended between the Mother and the Son (for the other Demands on both Sides, will, I presume, easily be determined) is, whether the Lady Dowager, the Plaintiff in the Cross Bill, shall have the Benefit of the Trust of the Term, as to a third Part of the Profits above the Charge of the Annuities, during their respective Continuance, and after the Determination, a third Part of the whole Profits as her Dower.

And as this Case is, I am of Opinion she ought; before I proceed, I must declare, that I intend not, in the least to enervate the Decree of Dismission in the Lady *Bodmyn* and *Vandebendies*'s Case, which stands confirmed in the House of Lords; but to distinguish this present Case out of the Reason and Judgment of the Decree, but agree that it ought to stand for ever in this Court.

I observe this Term is expresly attending, and waiting on the Freehold and Inheritance, nay, waiting, during the

the very Charge, and the Charge of the Annuities, as to the Surplus of the Profits.

My reaſoning ſhall be drawn from the Original Inſtitution of this Court of Equity and Conſcience, and alſo from the Rules and Common Law Principles of that which is Regular Law, which is bound to Rules, to which Equity in general may be ſaid to be oppoſite. For all Kingdoms in their Conſtitution, ſays my Lord *Hobbard*, are with the Power of Juſtice, both according to the Rule of Law and Equity. Theſe are the Grounds which I ſhall go upon, and not upon any Notions or Arbitrary Rules of my own.

My firſt Reaſon is, that the Right a Dowreſs has to her Dower, is not only a legal Right ſo adjudged at Law, but is alſo a moral Right to be provided for, and to have a Maintenance and Suſtenance out of her Huſband's Eſtate to live upon; ſhe is therefore in the Care of the Law, and a Favourite of the Law; and upon this moral Law. is the Law of *England* founded, as to the Right of Dower.

Now Equity is no Part of the Law, but a moral Virtue, which qualifies, moderates, and reforms the Rigour. Hardneſs, and Edge of the Law, and is an univerſal Truth; it does alſo aſſiſt the Law where it is defective and weak in the Conſtitution (which is the Life of the Law) and defends the Law from crafty Evaſions, Deluſions, and new Subtilties, invented and contrived to evade and delude the Common Law, whereby ſuch as have undoubted Right are made remedileſs; and this is the Office of Equity to ſupport and protect the Common Law from Shifts and crafty Contrivances againſt the Juſtice of the Law. Equity therefore does not deſtroy the Law, nor create it, but aſſiſt it.

Now, what is it that hinders the Lady from her Right, ſhe has obtained Judgment in Dower at Law, the Law has given it to her. Ay! but there is a Rule of the Law enter'd, call'd a *Ceſſat Executio*, the Effect and Power of which ſtops her Execution, and the Benefit of the

Judgment that ſhe has obtained: For how long? During the Term of 99 Years: A hard Injunction; but upon what Ground or Reaſon? Why, becauſe the Common Law ſays, her Title is the Marriage, Seiſin, actual Poſſeſſion, and Death of her Husband; and there never was a Time, if her Lord died, that ſhe ſhould have had immediate Dower; becauſe this Term was a legal Intereſt before the Marriage, continuing at the Time of the Death of her Husband, and pleadable in Barr by the Heir to her Demand of Dower, and this is the Common Law.

But notwithſtanding this, I conceive ſhe is relievable, and that this ſtrict rigorous Rule of the Law ought to be moderated by Equity and Conſcience for theſe Reaſons, and the Precedents hereafter cited.

1*ſt*, From the Nature, End, and Deſign of creating this Term, by the Settlement it appears to be created by *Edward* Lord *Dudley*, for making Proviſions out of the Profits for his Son and Grandchildren, which Nature obliges him to take Care of; and after that Office and Truſt performed, the two Truſtees are to permit and ſuffer the Perſon and Perſons, who from Time to Time ſhall have a Right of the Freehold of the Premiſſes, to receive the Reſidue of the Profits that ſhall remain after the Performance of the Truſts.

That Perſon was the Dowreſs's Husband, who had an undeniable Right to the Surplus of the Profits, and had an Eſtate Tail in him, and the Dowreſs under him has a good Equity to have her Dower, becauſe the Truſt of the Term was expreſly to attend the Perſon that ſhould have the Freehold, and her Husband had the Freehold, and ſhe has the Freehold; and the Words of the Declaration of the Truſt are thereby literally ſatisfied; tho' I am of Opinion, that if the Words had been in general to attend the Inheritance, it would have been the ſame Thing, and ſhe has a Right to this Truſt within the Deſcription.

It is no ſtrange Notion at Law, that long Terms for Years ſhould attend and wait on an Inheritance, in which

Caſe they are to be governed and directed by the Intention of the Parties that created them, and who, when they have put an End to them, then they have done their Office, Duty and Truſt, and have born the Burthen, I mean have raiſed theſe Portions, which was the original Cauſe of their Creation; and therefore in Equity and Conſcience ought then to ceaſe, and return back to the Channel from whence they were extracted; and it is a Reaſon in Law, that *Ceſſante cauſa ceſſat effectus*, and there is no original Conſideration to give them a longer Being, and ſuch a Term ought not to be made Uſe of to any other Purpoſe, eſpecially to deprive a Dowreſs of her Dower.

For the Nature of theſe waiting Terms, I muſt compare them to Covenants, Conditions, Reſervations, and Warranties, which my Lord *Hobard* in the Earl of *Clanrickard's* Caſe ſays, do all wait and join to the Grants, whereof he there gives ſeveral Inſtances, and ſays, that a Reſervation of a Rent which is but a Shadow, muſt be guided by the Body, which is the Eſtate, why ſhould not in like Manner this Truſt, which is expreſſly directed to wait upon and join the Freehold, which was in the Husband, and alſo in the Dowreſs, be guided and directed by the Body, which is the Freehold and Eſtate, and as in Caſe of a Reſervation of the Rent, which follows the Freehold, and is in Recompence of the Land.

2*dly*, This Truſt is an Intereſt annexed to the Eſtate immediately, as to the Surplus over and above the Charge, and is attending and ancillary to the Freehold and Inheritance, and this Truſt is a Right in Conſcience to take the Surplus of the Profits, during the Continuance of the Charge and the Annuities, and the whole Profits after the Charge raiſed and ſatisfied, and does moſt certainly enſue the Nature of the Land, for what are the Profits, but the Lands, or what is the Land, but the Profits; and the Lord was ever in Poſſeſſion of the Land by his Guardian and Truſtee, and was perfect Owner.

There can be no Queſtion, but this Term does attend the Inheritance and Freehold; but then the Queſtion is, To what Purpoſe does it attend? I conceive that it does attend to the ſame Purpoſes as an Advowſon appendant does to a Manor; a Commonage appendant to a Meſſuage and Land; a Villain regardant to a Manor, any Thing that is an Acceſſary, and that follows the Nature and Condition of the Principal: Nay, it is as the Logicians term it, *Adjunctum Subjecti*, an Adjunct or Quality adjoined, or rather re-annexed to its Subject in the Perſon of the Owner of the Freehold; but in ſome Caſes it ſeems to be merged or confounded in Equity; for it is Aſſets ſubject to a Debtor; and is not Dower a Debt, and out of the Land too?

And therefore my Lord *Hale* in Sir *John Saunders*'s Caſe, *Mich.* 20. *Car.* 2. is of Opinion, that ſuch a waiting Term does not prevent Dower, or ought to ſtave off a Debt; for ſuch a Term ſhall be Aſſets, ſays he, if it attend an Inheritance in Fee Simple; but not if it attend an Eſtate Tail, which is not ſubject to Debts in Equity; but here the Lord has an Eſtate Tail, to which Dower is incident, and therefore ſhall attend the Dower.

And in Sir *George Saunders*'s Caſe, it was adjudged, that a waiting Term in Truſt follows the Eſtate, as the Shadow does the Body, and is of the ſame Nature and Quality, and it is there compared to a Box of Writings which follows the Land.

The Dowreſs here ought to be regarded as a Purchaſor, conſidering her Portion, her Quality, a Match no Way unequal, a Marriage treated, no ill Method or Practice uſed, looked upon by good and learned Council to be dowable, the young Couple being young, under Age, and unwilling to ſtay till Age to make a Settlement, and above all, no Debts or Portions on the Eſtate, but two or three Annuities.

Again, ſhe ought to be preferred to the Heir her Son, 1*ſt*, Becauſe her Right (tho' it may be ſaid Concurrent) is Prior in Time to the Heir it began by the Intermarriage.

2*dly*,

2*dly*, That the Heir loses (if I may call it so) but one Third to his Mother for her Dower, and retains two Thirds to himself, which is not unreasonable.

3*dly*, The Courts of Law, tho' she has Judgment, cannot assist her against this Term; because, being a Trust, they have no Cognizance of it, and is a Creature of this Court, and only determinable here, and without the Assistance and Relief of this Court the Judgment for Dower is enervated and eluded by the *Cessat Executio*, for by the Judgment she has Dower; and by the *Cessat* she is prevented, during the Term of 99 Years, and it is most probable, that she will not outlive the 99 Years, without which she cannot have Benefit of her Judgment, and all the Remedy at Law is vain and illusory, and no Remedy any where but here; and yet her Right is fixed and unfixed by the Judgment at Law, and Right without a Remedy is nothing; and therefore I hold the Common Law to be Defective in this Case as to the Execution, and ought to be assisted by Equity.

But to conclude this Point, as between the Dowress and the Heir, this very Case is admitted in the very Argument of the Lady *Bodmyn* and *Vandenbendy*, for (says the printed Case, *Parliament Cases* 71) it perhaps would be prevalent against an Heir, but not against a Purchasor; and so I conclude it to be beyond a Perhap.

It is objected here (as in that last Case) that the Demand of Dower is a Right not arising by the Agreement of the Parties (which if defective or imperfect, might be supplied by Equity) but by Operation of Law: Now I presume the Difference is meant between a defective Jointure and Dower; but I conceive that it is a Distinction without a Difference in Words only, not in Sense, and a Marriage is as much a Contract (and I am sure more Sacred) and ought to be as much regarded and relieved as a defective Jointure, which is the Agreement of the Parties, the Distinction is commonly expressed in *Latin*, Dower is *ex provisione Legis*, a Jointure, *ex provisione Hominis*; but each of them is but a Provision for the

2 Wife,

Wife, and that the Law makes ought to be regarded, and supported by Equity preferable to the other; they are both grounded upon Contracts, as my Lord Chancellor *Jefferies* says, in the Report of Lady *Radnor*'s Case, and he could not imagine a Reason why a Jointress should be relieved against such a waiting Term, and not a Dowress; it is there also agreed, that if a Lease be made precedent to a Marriage in Trust to pay Debts, the Heir paying the Debts shall be relieved against the Lease, and set it aside, why not the Dowress? I think so too.

I shall now give an Answer to the Judgment in my Lady *Bodmyn*'s and *Vandenbendy*'s Case, which is cited to over-rule this Case in Point.

I conceive, that Case purely to have been decreed in Favour of a Purchasor, and the Strength of it to be grounded on the general Inconveniencies that would attend all Purchasors *bona fide*, without Notice, which was the Point my Lord *Jefferies* and *Sommers* went upon, and for which Occasion was cited the Case of *Basset* versus *Nosworthy*, 26 *Car.* 2. in Lord *Nottingham*'s Time, which was thus, *Nosworthy* pleaded himself a Purchasor for valuable Consideration without Notice, which Plea being proved, came to be heard upon the Merits, and the Lord *Chancellor* declared, That a Purchasor, *bona fide*, and without Notice of any Defect in his Title at the Time of his Purchase, may lawfully buy in any Statute Mortgage, or any other Incumbrance; and if he can defend himself by those at Law, his Adversary shall have no help in Equity to set those Incumbrances aside, for Equity will not disarm a Purchasor; and Precedents of this Kind are very ancient and numerous, where the Court has refused to give any Assistance against the Purchasor, either to the Heir, or to the Widow, the Fatherless or to the Creditors, or to one Purchasor against another, and this Rule in Chancery is in Vindication of the Common Law, where the Maxims which refer to Discents, Discontinuances, Non-Claims, and Collateral Warranties

 are

are only the wise Arts and Inventions of the Law to protect and quiet the Possession, and strengthen the Right of Purchasors, &c.

I have cited these Reasons at large, because it strengthens the Judgment in *Vandenbendy*'s Case, and let all such Purchasors be supported and protected; but surely the Precedents in this Case will not support the Heir in our Case, against another that Demands her Dower.

As to the Precedents, I shall mention some that weigh with me, besides the natural Justice of the Case.

The first I shall make Use of is *Fletcher* and *Robinson*'s Case, 6 *May* 1653. *Henry Robinson* on good Consideration promised to assure the Manor of *Buckton* to his eldest Son in Fee, but falling into some Trouble for Counterfeiting a Warrant, he convey'd *Buckton* to his younger Son, in Trust, only to secure it against a Forfeiture; the Father being freed from Trouble, convey'd *Buckton* to his eldest Son, and dies; the eldest Son dies and leaves a Widow, having no Issue, and the younger Brother his Heir; on Dower brought by her, the Conveyance to the younger Brother was given in Evidence, whereupon she was Nonsuited; but upon a Bill brought by her here, the Case appearing, *ut supra*, she had a Decree, and a Commission directed to set out the Thirds; and tho' this was much contested, yet Equity and Justice prevailed; and tho' the Time in which this was adjudged may be objected, yet were they learned Men who deliberated well and pronounced their Decrees and Judgments according to their Oaths, and according to Justice and Equity.

Serjeant *Vaughan*'s Case is, in Point, and *Snell* and *Clay*'s Case, which was heard 6 *W.* and *M.*

The Common Law is, That if a Rent be reserved on a Lease for Years, made precedent to Marriage, the Wife shall recover Dower of the third Part of the Rent immediately, and also of the Land, with a *Cessat executio durant. Termino.*

Why then ſhould not the Declaration of the Surplus of the Profits to the next Perſon to whom the Freehold ſhall come, be looked upon in Conſtruction, to be a Reſervation of Rent, as it is in Effect and in Intention, and ſo to be conſtrued in Equity to aſſiſt a Right of Dower; for a Rent is certainly part of the Profit of the Land, and is paid therewith, why ſhould not this ſupply a Reſervation in Equity?

I think I have Law and Equity on my Side, and likewiſe the Precedents which, according to my Lord *Hobart*, 270 are built upon Reaſon and Juſtice, and *tantum habent de lege, quantum habent de Juſtitia*; I muſt therefore decree the Lady Dowager the Benefit of this Truſt Term, and that the Truſtees Mr. *Ward* and Mr. *Dilkes* do account to her for the third Part of the clear Profits above the Charge of any yearly Annuities, from the Death of her Husband, and from Time to Time for the future, during the Term, and the Term to ſtand charged therewith during her Life, the Truſtees to be allowed their Coſts and Charges according to the Deed, and to be indemnified, and Coſts to be paid to the Plaintiff, the Lady, and all the Defendants out of the Truſt Eſtate.

Franklyn verſus Earl of *Burlington*.

Caſe 202.
2 Vern. 512 S. C.

A Deviſe of the Furniture and Pictures at the Houſes *A. B.* and *C.* paſſes not Plate, which the Teſtator conſtantly uſed, and removed with him when he went from one Houſe to another.

RICHARD Earl of *Burlington*, in 1697, deviſes thus. *Item*, My Will and Pleaſure is, that the Furniture and Pictures in my Houſes at *A. B.* and *C.* ſhall always remain there, and not in the Power of my Executors to diſpoſe of, but ſhall go with my ſaid Houſes to ſuch of my Grandchilden as ſhall be in the Poſſeſſion thereof: And then appoints, that the Plate Gilt with Gold belonging to his Chapel at, *&c.* together with the Ornaments thereof, ſhould remain to the perpetual Uſe of the ſaid Chapel, and makes *D.* Executor, to whom he gives all his Perſonal Eſtate, except what is before bequeathed, of what Nature or Kind ſoever.

The

The Queſtion was, Whether the Plate the Teſtator conſtantly uſed and removed with him, when he went from one Houſe to another, ſhould go to the Executor by the laſt Clauſe, or belong to the Houſes under the Word *Furniture*.

My Lord *Keeper* was of Opinion, that the Word Furniture in a large Senſe takes in Plate, but not here, becauſe he diſtinguiſhes the Chapel Plate from the Furniture, and the Plate of ordinary Uſe that was carried with him, would no more be ſaid the Furniture of one than of the others, and he meant only the particular Furniture of each Houſe, ſo the Plate went to his Executors, and liable to the Plaintiffs, who were Creditors.

Caſe. 224

Tilly verſus *Bridges*.

MY Lord *Keeper* was of Opinion in this Caſe, that when one has Title to the Poſſeſſion of Lands, and makes an Entry, whereby he becomes intitled to recover Damages at Law, for the Time the Poſſeſſion was detained from him after ſuch Entry; he ſhall not turn that Action at Law into a Suit of Equity, and bring a Bill for an Account of the Profits, except in Caſe of an Infant, or ſome other very particular Circumſtances.

Caſe 225. 2 Vern. 52[illegible]. S. C.

Beſt verſus *Stampford*.

Feme Inheritrix raiſes a Term for 1000 Years in Truſt for the Huſband, for Life, then for their Children (if any) their Executors and Adminiſtrators; and if the Wife Survives, in Truſt for her, her Executors and Adminiſtrators: The Huſband dies without Iſſue; the Wife marries a ſecond Huſband, and dies; the Huſband takes out Adminiſtration to her, yet decreed that the Term ſhould attend the Inheritance.

A Feme Inheritrix before Marriage raiſes a Term for 1000 Years in Truſt for her intended Huſband to receive the Profits during their Joint Lives; and if they ſhall have any Children, in Truſt for ſuch Children, their Executors and Adminiſtrators during the reſt of the Term; and if the Huſband ſurvive her, in Truſt for him, during his Life; but if ſhe ſurvive him,

3 then

then in Truſt for her, her Executors and Adminiſtrators, during the reſt of the Term.

The Husband dies without Children, and the Wife ſurvives, and takes another Husband, who ſurvives, and takes out Adminiſtration to her.

The Queſtion was, If the ſaid Term ſhould go to him, or attend the Inheritance, and go to the Heir.

Lord *Keeper*. This is only an unſkilful Declaration, and not the Intent of the Party, and the particular Purpoſe being ſerved, it muſt attend the Inheritance, for ſo I think it was at her ſecond Marriage, and that could not be altered by her Death; for *Equitas ſequitur Legem*, and cited *Pollhill* and *Pollhill*, and if the Term and Inheritance had been in the ſame Hands, 'twould have merged, ſo here it ſhall be attendant in Equity.

DE
Termino S. Hillarii,
1705.
In Curia Cancellariæ.

Case 206.
5 *January*.

Where on a Bill to call a Trustee to Account, he by Answer submits readily to it, tho' found in Debt, shall pay Interest for the Ballance only, from the Time of the Account liquidated, and no Costs; *secus*, if he controverts the Account there, if found in Arrear, shall pay Interest and Costs.

Parrot versus *Treby*.

ON a Bill brought to call a Trustee to an Account, it was held by my Lord *Keeper*, that if he by Answer submits readily to it, tho' on the Account he be found in Debt, yet he shall pay Interest for the Ballance only from the Time of the Account liquidated, and no Costs, if he has not misbehaved himself; but whereas in this Case, he said, in his Answer, he believed the Plaintiff considerably indebted to him; and after the Matter had depended 20 Years, is found 200 *l.* in the Plaintiff's Debt, he shall pay Interest from the Time of the Bill; for he admits by such Answer, that he has not kept any Money for the Plaintiff, useless, or unemploy'd, and in a Manner dares the Plaintiff to the Account, and therefore must pay Costs, as the Plaintiff must have done, if he had been found indebted to him.

Gore versus *Knight.*

Case 207.

A Feme Covert, who makes Profit of a Real or Personal Estate, settled to her separate Use, may dispose of such Profit as she pleases.

WHERE a Woman before Marriage, by Consent of the Man makes over her Estate, Real and Personal, to be at her own disposal, all the Product or Increase of it, or that which comes in lieu of it, shall be also at her disposal.

DE

Termino Paschæ,

1706.

In Curia Cancellariæ.

Powell versus *Bell.*

Case 208.

An Executrix or Administratrix wastes the Personal Estate, and then marries and dies, the Husband shall be chargeable in Equity to answer it in Nature of a Debt, so far as any Fortune of his Wife's come to his Hands will extend, unless he had made a Settlement on her Adequate to that Fortune, without Notice of the Debts or Devastavits.

THE Defendant had married an Administratrix to her former Husband, to a Share of whose Personal Estate the Plaintiff was intitled, the Administratrix was likewise intitled to a Third; and before her second Marriage had wasted great Part of the Estate, and then died.

This

This Bill was brought againſt her Husband to have an Account of the Eſtate, and a Satisfaction for his Share, and being heard at the *Rolls*, an Account was decreed to be taken of what of the Eſtate had come to the Hands of the Adminiſtratrix before her ſecond Marriage; and alſo what had come to her or her Husband's Hands ſince the Marriage, and the Plaintiff to have Satisfaction againſt the Defendant abſolutely, for ſo far as came to his or his Wife's Hands after Marriage, and for what came to her Hands before her ſecond Marriage, to have a Satisfaction againſt the Defendant, ſo far as he had any Eſtate of his Wife's, and this was affirmed on Appeal to my Lord *Keeper*.

Mr. *Vernon* ſaid, it has been ſeveral Times held, that where a Man marries a Woman, without ſtipulating for any particular Fortune, or making any Settlement; if after the Death of the Wife, Debts of hers appear, the Husband (not being a Purchaſor in ſuch Caſe) ſhall be anſwerable for the Debts of the Wife in Equity, ſo far as he had any Money or other Perſonal Eſtate of hers.

Caſe 259.

Aſtry verſus *Aſtry*.

If a Man gives his Wife Power to divide his Eſtate amongſt his three Children, ſhe muſt do it equally.

IN this Caſe was cited the Caſe of Sir *George Crook's* Daughter, who had left a Power to his Wife to deviſe her Eſtate among his three Daughters in ſuch Proportions as ſhe ſhould think fit; yet it was held in this Court, that ſhe muſt divide it amongſt them equally, unleſs a good Reaſon can be given for doing otherwiſe.

DE
Term. S. Trinitatis,
1706.
In CURIA CANCELLARIÆ.

Orby versus Lord *Mohun.*

Case 210. 2 Vern. 531. S. C. Tenant for Life, with a Power to make Leases of all Land anciently demised, reserving the ancient Rents, and of the other Lands reserving the best improved Rents, makes a General

Fitton Gerrard, Tenant for Life, with Power to make Leases for 21 Years, or three Lives; so as upon every Lease of such Lands as have been usually letten, and Fines taken for them, the old accustomed Rent or more be yearly reserved, and so as upon every Lease of other Lands not usually letten, nor Fines taken for them, there be reserved the best improved Rent that can be gotten for the same, and the Lessees to execute Counter-Parts thereof.

Lease of all the Lands reserving Rent in the very Words of the Power. Lease adjudged void by the Lord *Keeper*, and Chief Justice *Trevor*, against the Opinion of *Holt* Chief Justice.

Fitton Gerrard by Indenture 21 *December* 1702, demises to the Defendants all such Lands as have been usually letten, and Fines taken for them for 99 Years, if three Persons should so long live, with a Reservation in these Words, *yielding and paying therefore, the respective old and accustomed yearly Rents*, and if this Reservation was pursuant to the Power, was the Question.

My Lord *Chancellor* being assisted with the two Chief Justices, *Holt* and *Trevor*, decreed, that this Lease was not good to bind the Remainder-Man.

But my Lord Chief Justice *Holt* differed in Opinion, and held this Lease good.

1*st*. Because the Reservation being in the very Words of the Power; if the Power was good, the Reservation must be so too, for the same Words must have the same Meaning in both; and if a Sum certain had been reserved, yet it must have been averred to have been the ancient and accustomable Rent, or more; and therefore this Reservation in the Words of the Power may be helped by such an Averment, and consequently is good.

2*dly*, That if any of the Lands comprised in this Lease, had not been anciently lett, tho' the Reservation in such Manner as to them would be void, yet the Lease would remain good as to the others.

3*dly*, Though all the Lands were comprised in this one Deed of Lease, yet the Remainder-Man, who is to have all the Deeds in his Custody, might easily distinguish them, as well as if they had been lett by several Leases as they were formerly.

But my Lords *Chancellor* and *Trevor*, held this Lease void against the Remainder Man, and not pursuant to the Power.

1*st*, Because it was intended, That the Words of the Power should be turned *Verbatim* into a Reservation in Leases; and to say, that if the Words in the Power are good, they cannot be bad in the Reservation, suppose in the Power to make Leases, it was provided, that in every such Lease there should be inserted such Covenants as are usual in Leases in that County, and a Lease were made in the very Words of the Power: Would this be good? Certainly not, nor would it be aided by any special Verdict, finding the Covenants usual in that County.

2*dly*, The Question in this Case is not between the Lessor and Lessee (between whom, perhaps, the Lease might be good, and the Rent recoverable) but the Que-

ſtion is, as to the Remainder-Man, whoſe Remainder and Inheritance is to be charged by a Power, which is to be taken ſtrictly, and is not purſued, for the Intent thereof was, that a certain Rent might be reſerved upon every Leaſe to be made, that ſo he in Remainder might know how to come at it, and from his Action for the Recovery thereof, which as this Reſervation is, he cannot do, but will be involved in perpetual Controverſy and Uncertainty, for he muſt not only aver and avow, that the Sum he diſtrains for, is the ancient Rent, but muſt alſo prove it; for if the Tenant can ſhow another more ancient Rent, then he may *Nonſuit* the Remainder-Man, and ſo *toties quoties*, he deſtrains or avows for any Rent, the Tenant, by ſhowing that another Rent has been reſerved, may baffle him, and keep the Land in ſpight of his Teeth, without any Rent at all, till he is ſo lucky as to hit upon the true Sum reſerved upon every ſeveral Leaſe, which will be very difficult for him in the Remainder to do, and is no ways agreeable to the Meaning of the Power; but if a certain Sum had been reſerved, and the Counter-part ſhown under the Tenant's Hand, he muſt either ſhow a more ancient Rent, or it will be preſumed for the Plaintiff; and if he ſhould ſhow one more ancient, the Conſequence of that will be the avoiding of his own Leaſe, which to imagine he ſhould attempt is abſurd, and without defeating of the Leaſe he can never avoid Payment of the Rent, when it is reſerved in Certainty; but as 'tis reſerved here, 'tis wholly uncertain, and my Lord *Chancellor* ſaid, it was the firſt attempt that ever was made to delegate the Power generally, that was to have been executed particularly, and was a new Invention, tending to introduce Perjury, Forgery, and Frauds, and therefore not to be countenanced.

Grice

Case 211.

Grice versus *Goodwin*.

What shall be said, an Error appearing in the Body of the Decree.

JOHN GRICE by Will devises his Real Estate to his Wife, for Life, and after to *Thomas* his Son for 99 Years, if he should so long live, charged with the Payment of 500 *l.* a-piece to *John* and *Thomas*, the two eldest Sons of his Son *Thomas*, at their Ages of 21 Years, and dies.

Afterwards *John* the Grandson dies in 1694, an Infant, and Intestate, after in 1698 *Thomas* the Father dies, without taking Administration to *John* his Son; and a Bill was brought to have an Account and Distribution of the Personal Estate of *John Grice* the Grandfather, *Thomas* the Father, and *John* the Son.

On hearing the Cause, the Court had decreed the 500 *l.* Legacy devised to *John* the Grandson, to be distributed amongst his Mother, Brother, and Sisters equally; and a Bill of Review being brought to reverse this Decree,

A Legacy given a Child by a Stranger, at the Child's Death vests in the Father by the Statute of Distributions, altho' he took not out Administration to such Child.

The first Error assigned was, that on the Death of *John* the Grandson in the Life of *Thomas* his Father, his 500 *l.* Legacy vested in his Father by the Statute of Distributions, tho' he took not Administration to him, and therefore ought not to have been distributed, as the Personal Estate of *John* the Grandson, but as the Personal Estate of *Thomas* the Father, and then the Mother would be intitled to a third of it, and 'twas admitted it ought to have been so.

But 'twas insisted, this Error did not appear in the Body of the Decree as drawn up; for tho' 'twas laid in the Bill, that the Grandson died in 1694, and the Father in 1698, and that 'tis confessed in the Answer they died about the Times in the Bill; yet the Defendants being Infants, their Admission is not sufficient unless proved, and it shall be supposed it was not proved,

 because

becaufe if it had, the Court could not have made fuch a Decree, and the Proofs now cannot be referred to.

On the other Side, 'twas faid, taking the Fact to be as appears on the Face of the Decree, as drawn up and inrolled, 'tis a plain Error, and it muft be fo taken now, and the Queftion is not at prefent, Whether an Infant's Admiffion be good or not.

The Court held it an Error appearing in the Body of the Decree, fo the Decree was opened.

Lord *Bath* verfus *Sherwin.*

Cafe 21[illegible]

A Bill was brought for a perpetual Injunction, to ftay the Defendant from bringing any more Eject-ments, to try his Title at Law, fuggefting, that the Plaintiff had five Verdicts, and that it was an unrea-fonable Vexation, *&c.* therefore to put his Title in per-petual Peace, was the End of the Bill.

Chancery wont grant a perpetual Injunction, tho' the Party has had five Verdicts in Eject-ments at Law, unlefs there be fome Ingredient in the Caufe, which gives the Court Jurifdiction, as Truft, Fraud, Ac-cident, *&c.*

The Lord *Keeper*, after this had been fully debated, took Time to confider of it, and now delivered his Opinion, *viz.* That to give the Court an Original Jurifdiction, there ought to be a Fraud, or a Truft, or fome Accident fall out in the Cafe, to prevent fome great Inconvenience, as between a Lord of a Manor and the Tenants thereof, to fettle the feveral Rights; if in Cafe the Right between the Lord and the feveral Tenants was to be fettled in feparate Actions, the dif-ficulty upon the Lord would be infuperable, by Rea-fon of the Multiplicity of Suits at Law, the like in fettling Boundaries, *&c.* Therefore this Court will in-terpofe and direct an Iffue to be tried, and the Con-fcience of the Court thereby informed and fatisfied; this Court will then put the whole in Peace by a per-petual Injunction.

But this Cafe, he faid, was in its Nature new, and did not fall under the general Notion of a Bill of Peace; this being only between *A.* and *B.* and one Man is able to contend againft another; and if the Courts of Law on new Demifes, will not fuffer the former Verdicts to be pleaded, he could not help it, he faid, he was fatisfied of the Vexatioufnefs of the Defendant in this Cafe; but if it was a Grievance, it was in the Law, which was proper for another Jurifdiction, *viz.* the Parliament to reform, and that it would be Arrogance in him by Decrees or Injunctions to take upon him the Reformation of the Law.

DE Termino S. Mich. 1706.

In Curia Cancellariæ.

Hoskins versus *Hoskins*.

Case 215.

A. by Will gives 750 l. to his Son, and afterward buys him a Cornet of Horse's Employment for 650 l. which Sum (was proved) he intended to strike out of his Will.

Held that the 650 l. should go in Diminution of the 750 l.

SIR *John Hoskins* by Will, amongst other Things, devises to his younger Son *Henry Hoskins* 750 *l.* and afterwards buys him a *Cornet of Horse's* Employment, and paid 650 *l.* for it, and it was proved to be intended this 650 *l.* should be discounted out of the Legacy, and that he would strike so much out of his Will, as soon as the Accounts came from *London* to him, but died before they came, without altering his Will.

Per Curiam, This Money paid for the said Commission shall go in Diminution of the Legacy, and be taken in Payment and Satisfaction of so much.

Another Point was, Sir *John* by his said Will devised the Use of his Houshold Goods to his Wife, during her Widowhood, and made her Executrix during her Widowhood; and if she should die or marry, he appointed his Son and Heir to be his Executor; he also devised some Curiosities and Rarities to remain, as *Heirs Looms* in his Family; and the Question was, If the Widow, who had this Legacy of the Use of the Houshold Goods during her Widowhood, should have the undisposed

disposed Surplus of the Personal Estate, or if it should be distributed according to the Statute of Distributions.

My Lord *Keeper* was of Opinion, as this Case is, she shall have the Surplus, for she has but a limited Executorship; and tho' this Court has distributed the Surplus where the Executor has a Legacy on a supposed Intention of the Testator, that he intended him no more; yet here it cannot be intended so, as to exclude the Heir when his Executorship shall take Place; for as to the *Heir Looms* that appears to be given to another Intent, and not to exclude him from the Surplus, neither shall the Wife in this Case be excluded.

Case 214.

Murray versus *Wise* & al'.

A. devises 50 *l.* to his Heir at Law, and gives his Wife all the Rest, and Residue of his Real and Personal Estate, and makes her Executrix, these Words pass a Fee to the Wife.

A. By Will devises 50 *l.* to the Defendant, his Daughter and Heir, and gives all the Rest and Residue of his Real and Personal Estate whatsoever to his Wife, and makes her sole Executrix.

'Twas argued, That these Words do not pass a Fee, being joined with the Words Personal Estate, for which were cited, *Cro Car. Wilkinson* versus *Merryland*, 3 *Mod.* 164, and *Heylin* versus *Heylin* 228, and 4 *Mod.* 89, and the Earl of *Bridgwater* and Duke of *Bolton.*

But after some Time taken to consider of it, my Lord *Keeper* decreed, that this Devise carried the Fee.

Case 215.

Bowdler versus *Smith.*

ONE devises in these Words, *as to my Temporal Estate wherewith* God *hath blessed me, I give and dispose thereof, as followeth*; First, *I will that all my Debts be justly paid, which I shall at my Death owe or stand indebted in to any Person or Persons whatsoever, also I devise all my Estate in* G. *to* A.B. and this was all the Real Estate the Testator had, and *per* Lord *Keeper*, this Will creates a Charge on the Real Estate for Payment of Debts.

Noys versus Mordant. Case 216.

A Being in Possession of an Estate that was a Mortgage in Fee, by Will devises it to his Daughters *B.* and *C.* and their Heirs, and dies; *B.* marries and dies, the Question was, Whether the Share of *B.* should be decreed Real or Personal Estate, and consequently go to her Heir, or to her Husband, as her Administrator.

A. Mortgagee in Fee in Possession devises it to his two Daughters, and their Heirs; one of the Daughters marries, and dies, held that her Share should not go to her Husband as Personal Estate, but should descend to the Heir of the Wife.

My Lord *Keeper* decreed it against the Husband, and put this Case, a Man seised of Lands in Fee, which were only mortgaged to him, devises them to his Son and Heir, and his Heirs; surely these Lands shall descend as an Inheritance; or tho' the Mortgage be paid off, shan't the Money be considered as Lands, and go to the Heir, and his Heirs, as the Lands would have done, and this purely by the Intention of the Testator? And did not the Testator, who had a governing Power, intend in the present Case, that the mortgaged Lands should be considered, as any other Lands of Inheritance, and be subject to, and directed by the same Rules that other Estates are?

DE
Termino S. Mich.
1708.
IN CURIA CANCELLARIÆ.

Cafe 217. **Woodman** verfus **Skute.**

A. being taken by the Husband going to bed to his Wife, gives him Securities for Payment of 500 *l.* A Bill to be relieved against the Securities, alledging, that it was a Plot to catch him, and that he was compelled by threats to enter into them. Bill difmifs'd.

THE Defendant coming home from *Blakenly* Fair, finds the Plaintiff naked, and juft going to Bed to his Wife; he thereupon gets a Note from him of 500 *l.* which was in *June*, afterwards in *Auguft* following the Plaintiff gives him a Judgment, and in *October* following furrenders Copyhold Lands to him by way of farther Security.

The Plaintiff brought this Bill to have the feveral Securities delivered up, alledging, a Contrivance to catch him in that Manner, and that he was drunk, and did not know what he did; and that the Defendant with an Ax threatned to cut him in Pieces, fo that he was under Terror; and that the Defendant himfelf had faid in Company, that the Securities were for Money lent.

My Lord *Chancellor* obferved, that there was no Proof at all of a Plot to catch the Plaintiff in this Manner, nor that he appeared to be fo difordered or frighted; for he continued in the fame Mind when he was in cool Blood, at the feveral Times of giving the three different

ferent Securities; and it was proved, that he joined with the Defendant in giving out, that that Note was given for a Bargain of Grafs, fo that he knew what he was about, and had a Mind to conceal it.

If a Jury in this Cafe had given Damages, this Court could not relieve, and why fhould it? When the Plaintiff himfelf has three Times given and afcertained the Damages againft himfelf, it fhows he thought the Damages but reafonable; fo difmifs'd the Bill, but without Cofts; becaufe the Defendant has bragged of his Bargain, which was a Sign he thought himfelf over-paid, but my Lord *Chancellor* faid, he would relieve againft the Penalties.

Anonymous.

Cafe 218.

AN Uncle gives his Niece by Will 1200 *l.* the Niece marries, but antecedent to the Marriage the Father takes a Bond from the then intended Husband, to pay him 200 *l.* in Cafe the Daughter fhould happen to die without Iffue Male, in the Life Time of her Hufband, the Daughter did die without Iffue Male, living her Husband; whereupon the Father fued the Husband at Law upon this Bond, and the Husband brought his Bill here to be relieved againft this Bond, and had a Decree accordingly; for it appearing that no Money was paid, nor Confideration for entring into it, the Court took it to be in Nature of a Marriage Brokage Bond, and therefore ordered it to be delivered up.

Carter verfus *Bletfoe.*

Cafe 219.

MAtthew Bletfoe by his Will devifes his Lands to his eldeft Son *S. Bletfoe*, and his Heirs; but his Will and Mind is neverthelefs, that the faid *S. Bletfoe* fhould pay out of the Land fo devifed to him, the Sum of 600 *l.* *viz.*

A. devifes to his two younger Sons and a Daughter out of Lands, Portions of 600 *l.* a-piece, payable at 21, with Maintenance; the Daughter marries, and dies under Age, having two Children; held that this was not fuch an Intereft vefted in her, as fhould go to her Husband as Adminiftrator.

viz. to his Daughter *Mary* the Sum of 200 *l.* at her Age of 21 Years; and to his Son *John* 200 *l.* at his Age of 21 Years; and to his Son *Matthew* the Sum of 200 *l.* at his Age of 21 Years; and if it should please God to take out of this Life his Son *S. Bletsoe*, before he attained the Age of 21 Years, then his Will was, That his Son *John* should not have the 200 *l.* settled on him, but that it should be paid to *Mary* and *Matthew*, to be added to their Portions, and he to have all the Estate given to *S. Bletsoe*, paying the 600 *l.* as before expressed, and that his said Children shall be allowed 4 *l. per Ann.* Maintenance for every 100 *l.* until their several Portions were paid.

S. Bletsoe died before his Age of 21 Years, the Plaintiff married *Mary*, and has two Children by her, *Mary* died two Months before her Age of 21 Years, and the Question was, Whether this was not a subsisting Charge upon the Land and Interest so vested in *Mary*, as to intitle the Plaintiff as her Administrator to the Legacies, tho' she died under 21 Years.

It was urged for the Plaintiff, that these were Portions, and so called by the Express Words of the Will, and by the Civil Law a Portion is always construed to be for Preferment in Marriage, which may happen long before the Age of 21 Years, as this Case was; and as to the 100 *l.* that fell to her on *S. Bletsoe*'s Death, and no Time was limited for the Payment of that, therefore the Plaintiff ought to have a Decree, *quoad*, that at least.

It was likewise urged, that 4 *l. per Cent.* being allotted till they came of Age, made it an Interest vested, and the Testator must intend this Devise, as a *Debitum in Presenti*, tho' *Solvend. in Futuro*, because Interest imports a Debt.

But my Lord *Chancellor* dismiss'd the Bill as to both Demands, because there was no Words in this Will which vested any Interest in those Legacies before the Age of 21 Years; and as to the other 100 *l.* that was governed by the other Legacies.

Hedges versus *Hedges*.

Case 220.

SIR *William Hedges* being a Freeman of the City of *London*, and having Children by two Venters, and being desirous to make a Difference between them in Point of Fortune, by his Will gives two of them a Specifick Legacy of a Bond of 3000 *l.*

A Freeman of *London* being desirous to make a Difference between his Children in Point of Fortune, devised to two of them a Bond of 3000 *l.* Afterwards by Advice of his Lawyer (whom he consulted about the best Method of securing of it to them) the Clause in the Will was obliterated, and the Will republished, and the Bond was altered, and new Security given in the Name of *J.B.* in Trust for these two Children; yet held, that this 3000 *l.* must be brought into *Hotchpot*, if they would intitle themselves to any farther Share of the Personal Estate.

Afterwards being in doubt, Whether it might not be best secured to them by some Act in his Life Time; he sent for his Lawyer to consult with him, and his Lawyer advised him to do it by Act executed in his Life Time; whereupon the Clause or Sentence in the Will which gave the 3000 *l.* was obliterated, and the Bond was altered, and a new Security given in the Name of Sir *James Bateman*, in Trust for those Children, and the Will republished; and soon after, Sir *William Hedges* died; and if these Children should have an equal Share of one Third of this Estate with the other Children, and also retain to themselves 3000 *l.* was the Question.

It was urged to be the plainest Intent of Sir *William* imaginable, that they should, and it would be contrary to Equity, that the Mistakes of the Lawyer should frustrate so manifest an Intent.

That rather than this should be construed an Advancement of them in Sir *William*'s Life, so as to make them bring it into *Hotchpot*, Equity ought to consider it as a Devise *causâ Mortis*, and that it should go out of the Freeman's Legatory Part.

But *per Curiam*, this cannot be construed a Devise, or *donatio causâ Mortis*; for that is, where a Man lies in Extremity, or being surprised with Sickness, and not having an Opportunity of making his Will; but lest he should die before he could make it, he gives with his own

Donatio causâ Mortis, what it is.

own Hands his Goods to his Friends about him; this, if he dies, ſhall operate as a Legacy; but if he recovers, then does the Property thereof revert to him; but in this Caſe the Teſtator Sir *William* acted deliberately, and made his Election, that they ſhould take by a Gift in his Life Time, and for that Purpoſe altered the Securities, and republiſhed his Will.

My Lord *Chancellor* farther ſaid, That he believed the Intent of Sir *William* was, as has been ſuggeſted; but if Men will deliberately lay down Premiſſes, and from thence draw falſe Concluſions, this Court has no Juriſdiction to ſet right ſuch Miſtakes; and tho' Sir *William* thought, that notwithſtanding this Advancement, they would come in for an equal Share with the reſt of the Children; yet 'tis plain, that both he and the Lawyer miſtook the Law and Cuſtom of *London*, and ſhall this Court interpoſe when there is no Fraud or equitable Circumſtances in the Caſe; and therefore decreed the 3000 *l.* to be brought into the *Hotchpot*, if they would intitle themſelves to any farther Share.

Caſe 221.

Attorney General, at the Relation of the Maſter and Fellows of *Sidney* College in *Cambridge*, verſus *Bains* and *Mary* his Wife, Heir of Dr. *Johnſon* & al'.

A Will wanting Witneſſes, won't Operate as an Appointment to a Charity, by the 43 *Eliz.*

DR. *Johnſon* ſeiſed of ſeveral Freehold and Copyhold Lands, and poſſeſſed likewiſe of divers Leaſehold Lands, ſurrenders the Copyhold to the Uſe of his Will, and after makes his Will in Writing, whereby he deviſes all his Eſtate, *viz.* Freehold, Copyhold, and Leaſehold to Truſtees, their Heirs and Executors in Truſt, for the Maintaining and Providing for ſeveral poor Scholars of *Sidney* College in *Cambridge*, and for divers other Charities in his Will particularly expreſſed and directed, and this Will was all written with his own Hand, but had no Witneſſes to it.

Afterwards he makes a Codicil, wherein he recites and takes Notice of the Will, and this Codicil was subscribed by four Witnesses, and duly executed, and soon after dies.

And now this Bill was brought to have the Trustees take upon them the Trusts, and to have a Specifick Performance thereof.

It was urged, in support of the Charities, that as to the Copyholds, no Question could be made, but that the Will was sufficient, because they did not pass by the Will, but by the Surrender; and as to the Leasehold Lands, they being but Chattels, are Part of the Personal Estate, and not within the Statute of Frauds and Perjuries.

As to the Freehold Lands, tho' the Will be not effectual as a Will to pass them within the Statute of *Frauds* and *Perjuries*, for want of conforming to the Circumstances required by that Statute; yet it is good as an Appointment to a Charity within the 43 *Eliz.* for which was cited 11 *Co.* the Case of *Magdalen* College, where want of Livery and Attornment shall be supplied, and also *Collison*'s Case in *Hob.* 2 *Rol. Rep.* 318, and *Dukes* on *Charitable Uses* 110, where it is held, that Tenant in Tail without Fine or Recovery, may by Will or otherwise appoint to a Charity, and such Appointment in all Cases, where the Party has a disposing Power, shall be supported in Favour of a Charity, tho' other Ceremonies to other Purposes would be requisite.

It was farther urged, that the Codicil taking Notice of the Will, and being duly executed, that makes the Will good too, as if it was affixed to the Will at the Time of the Execution thereof; for the Law annexes and construes it as Part of the Will, and the laying of it in another Place signifies nothing.

On the other Side it was insisted, that the Will not being executed according to the Statute of *Frauds* and *Perjuries* cannot be good to pass the Freehold Lands, and the taking Notice of the Will in the Codicil cannot mend it, for that, for ought appears, might be executed

in

in another Room, and the Witnesses to that see or know nothing of the Will.

That Devises or Dispositions to a Charity were not in all Cases supported, that Infants, Feme Coverts, and Lunaticks are as much disabled in this, as in all other Cases, that the Reason why Tenant in Tail may without Fine or Recovery devise to a Charity, is because the 43 *Eliz.* being subsequent in Time, has repealed the Statute *de Donis*, and by an artificial Distinction between a Devise and an Appointment; but the 29 *Car.* 2. is subsequent to the 43 *Eliz.* and extends as well to a Charity as any Thing else.

Lord *Chancellor.* I shall be very loth to break in upon the Statute of *Frauds* and *Perjuries* in this Case, as there are no Instances where Men are so easily imposed upon, as at the Time of their dying, under the Pretence of Charity, for the Statute requires that the Will shall be so and so circumstanced, otherwise it is void to all Intents and Purposes.

It is true, the Charity of Judges have carried several Cases on the 43 *Eliz.* great Lengths, and this occasioned the Distinction between operating by Will and Appointment, which surely the Makers of that Statute never thought of.

Afterwards it was decreed, that the Will not being good, as a Will, could not operate as an Appointment.

DE Termino S. Hillarii, 1708.

In Curia Cancellariæ.

Terry versus *Terry* and *Ragget*.

Case 222.

An Executor or Overseer, who has Power by the Will to Act in every Thing for the Advantage of an Infant, may lay out part of the Personal Estate in the Purchase of Lands in the Infant's Name; but if he lends the Money on a bad Security, he must Answer it out of his own Pocket.

THE Plaintiff's Wife *Eliz.* was the only Child of *William Goodier*, who made his Will, and the Defendant's Executors and Overseers thereof, for the Benefit of the Plaintiff *Eliz.* then and still an Infant, and impowered them thereby to act and do as they should think would be most for her Advantage, and died possessed of a Personal Estate to the Amount of 3000 *l.* and upwards, which the Executors possessed themselves of, having first proved the Will.

Some Time after, the Executors hearing some Copyhold Land was to be sold, which lay contiguous and near to other Lands of the Plaintiffs, and which had formerly been sold for 210 *l.* purchased the same in the Infant's Name for 200 *l.* and took a Conveyance accordingly.

Another 100 *l.* they lent out upon Bond to one, who at the Time of the lending was a considerable Trader, and esteemed a Man of Substance, having an Estate of 60 *l.* *per Ann.* besides his Trade, and several Witnesses swore they would at that Time lend him 500 *l.* upon his

own Note only; but it happened, that he after failed, and the Money became deſperate.

The Plaintiffs not liking the Copyhold Purchaſe, brought this Bill to have an Account of all the Teſtator's Perſonal Eſtate, and that the Defendants might be decreed to pay the ſame to the Plaintiffs, and not throw upon them the Loſs of the Money, and oblige them to take the Copyhold Land againſt their liking.

It was inſiſted upon to be the Practice of this Court, that Executors had no Power to inveſt Money in Lands, unleſs the Will had given them ſuch Authority; becauſe the Succeſſion of Land was to go one Way, and the Succeſſion of Money or Perſonal Eſtate another; and here, by this Purchaſe, the Husband would be defeated of ſo much of his Wife's Portion, over which he would have had Power, had not this Purchaſe been made, and therefore it ought not to ſtand.

The Defendants inſiſted upon the Power the Will gave them to Act for the Plaintiff's Advantage, and that this Purchaſe was ſuch; and as to the 100 *l.* relied on the Proof they made of the Perſon's Abilities at the Time they lent it.

As to the 100 *l.* my Lord *Chancellor* decreed them to pay it, and make the beſt they could of the Bond themſelves, either by a Commiſſion of Bankruptcy, or otherwiſe, as they ſhould be adviſed, and ſaid, he did this for Example to diſcourage Men from taking ſingle Perſons Bonds; and that conſidering the Contingencies and Hazards of Trade. A Man's Bond for 100 *l.* that is to lie any Time, is not Security for above 50 *l.* and ſo he would take this, notwithſtanding his Abilities at the Time of lending it; but as to the Copyhold Purchaſe, it appearing by the Proofs to be for the Plaintiff's Benefit, he decreed that to ſtand, and ſaid, that Purchaſes made in Infants Names, might be good enough, and here ſhe is ſtill an Infant, and therefore the Time of her Agreement or Diſagreement is not yet come; beſides, being married, ſhe has no Will of her own, and her Husband

has already shown his Consent to this Purchase, by cutting down Timber off the Land.

Then it was pray'd, that she might have Liberty by the Decree to dissent to this Purchase when she came of Age, and to claim the Money, but that my Lord disallowed likewise, and said, as the Tree falls so let it lie, and pronounced his Decree accordingly.

Kirk versus *Clark* & al'.

Case 222.

27 *January*.

A *Cestui que Trust* must in all Cases be a Party, but the Trustee needs not, especially if *Cestui que Trust* undertakes for him

THIS was a Bill brought by a Trustee to compel the Specifick Performance of Marriage Articles, and the *Cestui que Trust* was not made a Party, and therefore it was pray'd, that the Cause might not go on after opening the Bill and Answer, because if the Bill should be dismiss'd, the *Cestui que Trust* would not at all be bound by it, and so the Defendants liable to another Suit for the same Cause.

It was said, that tho' sometimes Bills brought by a *Cestui que Trust* had been allowed, without making the Trustee a Party; yet that was upon the *Cestui que Trust*'s undertaking for the Trustee, that he should conform to what Decree should be made, which might be reasonable, he having no Interest at all in his own Right; but a Trustee could not so undertake for his *Cestui que Trust*.

The Court ordered the Plaintiff to pay this Day's Costs, and to make the *Cestui que Trust* a Party, and the former Bill, Answer, and Depositions to stand, and the next Day the *Cestui que Trust*, who was a Feme Covert, was made Plaintiff by her Brother, and *Prochein Amy* against the Defendants, one of whom was her Husband, and the Course of the Court agreed to be, that a Feme Covert may sue her Husband by *Prochein Amy*, they would not make her Defendant, because 'twould have taken Time to have put in her Answer.

The Case appeared to be, that Sir *Nicholas Clark* was Tenant for Life of Copyhold Lands, with the Remainder to

A Surrender of the Reversion in Fee of Copyhold Lands to his Son, to lessen the Fine he must have paid, in Case it had come to him by Descent, after the Son's Treaty of Marriage; the Father tells the Wife's Friends, that this Copyhold was so settled, in Consideration of which, and of some Leasehold Lands, a Marriage was had, and 2000 *l.* Portion paid, this Surrender of the Copyhold held not to be voluntary or Fraudulent.

to his Wife for Life, the Reversion to himself in Fee, and makes a Surrender of the Reversion to his eldest Son in Tail, the Remainder to his own right Heirs, which Surrender was made to his Son, with intent only to lessen the Fine he would have paid, in Case the Reversion had come to him by Descent from his Father, he having it by this Surrender as a Purchase; afterwards upon a Treaty of Marriage between the Son and a young Lady, who was to have 2000 *l.* Portion, her Friends upon Discourse of a Settlement, understanding the Father had a Leasehold Estate besides the Copyhold, proposed to have both settled; but told him, they relied chiefly upon the Copyhold, that being the only Equivalent for the Fortune, upon which Sir *Nicholas* told them he had settled that already on his Son, by a Surrender; and thereupon an Agreement was made for settling the Leasehold Estate upon the young Lady, and the Issue of that Marriage, and reduced into Writing, and recited the intended Marriage and Portion, and that in Consideration thereof those Leases were agreed to be settled in such Manner as therein mentioned; and after, a Settlement was made accordingly; some Time after, Sir *Nicholas*'s Lady dying, and he being in Treaty for another Marriage, entered into Articles for making a Settlement upon her; and amongst other Things, covenanted to settle the Copyhold Lands on her for a Jointure, *&c.* to such and such Uses; and now this Bill was brought by her and her Trustees (the Marriage being had accordingly) to compel a Specifick Performance of those Articles.

For the Plaintiff it was insisted, that the Settlement on the Son was purely voluntary, before any Treaty of Marriage, and therefore fraudulent and void against Purchasors for valuable Consideration, without Notice, as the Plaintiff was; that if such, (as a Settlement made in such a secret Manner as this was) should prevail against the Plaintiff, the Intent of the Statute 27 *Eliz.* would be entirely defeated; and that this differed from a voluntary Settlement on a Wife or younger Children, for

whom the Father was bound to provide; but here it was upon the eldeſt Son, who would have had it without ſuch Settlement by Courſe of Deſcent, and therefore there could be the leſs Suſpicion or Notice of the Father's want of Power to ſettle it on his ſecond Marriage; it was likewiſe inſiſted, that the Agreement on the Son's Marriage, being reduced into Writing, the Parties had ſet up their Reſt there, and ought to be bound by it, and that it would be of dangerous Conſequence after ſuch Agreement in Writing, to admit of any looſe Diſcourſes had before, to make any Part of the Agreement, for when it was reduced into Writing, the Minds of the Parties muſt be ſuppoſed to be fully ſearched, and all that they intended to be contained therein; and ſeeing that Agreement mentions only the ſettling the Leaſehold Eſtate to be the Proviſion intended, no extravagant Parol Declarations of the Father's having already ſettled the Copyhold Eſtate on him, ought to be admitted, nor any Proof to enforce the ſame; and then that Agreement in Writing ſtanding ſingly on the Leaſehold Eſtate, the Copyhold Eſtate which was long before ſettled, and at a Time when there was no Proſpect of the Son's marrying, ought to be looked on as Voluntary, as againſt the Plaintiff, and the rather, becauſe the Intent of it appears to be only a Contrivance to eaſe the Son of the great Fine he muſt have paid, in Caſe it had come to him in Courſe of Deſcent, and for no other Reaſon ſince he was not to have it till after his Father's Death, he keeping the Eſtate for Life ſtill in himſelf.

On the other Side, 'twas ſaid, that this ought not to be looked upon as a voluntary and fraudulent Settlement, as to the Plaintiff, becauſe it was the Chief Inducement that prevailed on the Friends of the Son's Wife to conſent to the Marriage, and to give her ſuch a Fortune; and that if they had not been aſſured the Copyhold was already ſettled on the Son, they would have inſiſted on a Settlement thereof, or not have given her ſuch a Portion, and to make void this Settlement now would be to

give the Father Leave firſt to marry his Son to that Eſtate, and then again, after to marry himſelf to it, and ſo to make the ſame Eſtate a Snare and Trap to deceive either his own or his Son's Wife, and the Surrender to the Son being upon Record, the Plaintiffs might have had Recourſe thereto, and ſatisfied themſelves, and there was no Occaſion upon the Son's Marriage, *actum agere*, to ſurrender the Copyhold to him, when he had it already.

My Lord *Chancellor* decreed the Surrender to the Son good; and tho' it were at firſt voluntary, yet upon his Treaty of Marriage, it being regarded as the principal Inducement thereto, it now became valuable, and ought to be conſidered, as if it had been but then ſurrendred to the Son; and it was not neceſſary to inſert it in the Articles, it being an Eſtate of another Nature, and to paſs in another Manner, and being already ſettled, it was ſufficient in the Articles to provide for the Settlement of what they farther intended to ſecure on that Marriage, without taking Notice of what was already ſettled to their Satisfaction; and ſo the Copyhold paſſed by the Surrender, as a proper Conveyance for that Kind of Inheritance, and the Leaſehold by the Settlement as a proper Means for carrying over that, and both together made the Settlement inſiſted and agreed upon to be made, and were in Conſideration of Marriage, and a Marriage Portion which ſurely is a valuable Conſideration, and ought not to be ſet aſide as fraudulent in a Court of Equity, and ſo diſmiſs'd the Bill with Coſts.

Caſe 224.

Powell verſus *Powell.*

A Decree againſt Tenant in Tail, who had agreed to ſell his Eſtate, he ſtands out all Proceſs of Contempt for not obeying it, yet his Iſſue not bound by it.

IN this Caſe was cited a Caſe where Tenant in Tail contracted for Sale of his Lands, and received part of the Conſideration Money; and upon his not making good

good the Sale by Fine or Common Recovery, a Bill was brought in Equity to compel him thereto, and a Decree pronounced accordingly; he notwithstanding stood out all Process against him to a Contempt, and then died before the Sale was perfected; and after his Death a Bill was brought against his Issue in Tail to revive the Decree against him, but was dismiss'd; for tho' the Tenant in Tail had Power by the Fine or Recovery to have barred his Issue; yet since he did not make Use of that Power, his Issue could not be bound by any other Act of his.

DE
Termino Paschæ,
1709.
In Curia Cancellariæ.

Case 225. **Whitcombe versus Whitcombe.**

Where the Entry of the Mother as Guardian in Soccage to her Infant Son, shall gain a *Possessio Fratris.*

THE Plaintiff's Bill was to set out of the Way several Terms for Years kept on Foot by the Defendants, the Trusts whereof were satisfied, and to be admitted to redeem other Terms for Years on Payment of what should appear to be due thereon, that so the Plaintiff might be let in to try his Title at Law, in an Ejectment, as Heir to one *Whitcombe*, an Infant deceased.

Upon opening the Bill and Answer, the Case appeared to be this, *Peter Whitcombe*, Father of the Defendants, was a *Turkey* Merchant, and being abroad in *Turkey* several Years, acquired a very considerable Personal Estate; and upon his Return Home intermarried with one Mrs. *Sherrard*, with whom he had 5000 *l.* Portion, and by her had Issue two Daughters, both Defendants, and both under Age; some Time after the Marriage, *Peter Whitcombe* purchased the Estate in Question, being of the yearly Value of 600 *l.* or thereabouts, and soon after his Wife died; and then he intermarried with the Defendant the Lady *Hoskins*, and about *Septemb.* 1704 died, leaving the Lady *Hoskins* enseint of a Son, whereof she was delivered about three Months after her Husband's Death. Immediately upon her

her Husband's Death, the Lady *Hoskins* entred upon his whole Eſtate, and received the Profits thereof, and held Courts in the Name of the two Daughters, as Heirs at Law, and cut down about 1000 *l.* worth of Timber for Maintenance of herſelf and her Children; afterwards the Son was born, and lived about nine Months, and then died; thereupon the Plaintiff, as Heir at Law of the whole Blood to the Infant, who was laſt ſeiſed of the Freehold and Inheritance of the Premiſſes, brought his Ejectment to recover the Poſſeſſion thereof, and made out his Title thus, *viz.* Son and Heir of *John Whitcombe*, who was Son and Heir of *Peter Whitcombe*, who was Grandfather of *Peter Whitcombe* the Merchant, Father of the Infant Son; upon the Trial, the Defendant ſet up ſeveral Terms for Years, whereupon the Plaintiff was Nonſuit.

He now brought this Bill to be relieved againſt thoſe Terms, and have thoſe whereon nothing was due to be ſet aſide, and be admitted to redeem others, whereon any Thing ſhould appear to be due, that ſo he might try his Title at Law to the Lands in Queſtion.

The Defendants the Infants, by their Guardian anſwered, and admitted, that their Father was ſeiſed of ſuch Eſtate, and had ſuch Iſſue, and hoped the Court would take Care of their Intereſt.

The Lady *Hoskins* admitted likewiſe ſuch Seiſin of her Husband, and ſaid, that after his Death ſhe entered and held Courts in the Name of the Infants the Daughters, and cut down ſuch Timber, and ſhe and the other Defendants inſiſted, they ought not be compelled to give the Plaintiff any Aſſiſtance to make out his Title.

For the Plaintiff it was inſiſted, that when the Father died, and his Wife entred generally, ſuch Entry ought not to be conſtrued a Tort, when it will admit of another Conſtruction, as it will in this Caſe, and that is, as having a Right and good Title as Guardian in Soccage to her Infant Son; and then her Seiſin was a Seiſin for him,

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and would intitle the Plaintiff as fully, as if the Infant himself had been in actual Possession, and though she might indeed, after such general Entry, so far declare her Intention, as to make her a Disseisess *ab initio*, as if she had afterwards levied a Fine; yet without some such Act she should not be taken to be wrong Doer, when by a reasonable Construction her Entry might be intended lawful, and no Parol Declaration in *Paijs*, would serve to make her Entry wrongful; and if this were so, then nothing stood in the Plaintiff's Way to hinder his being relieved in this Court; for as to the Terms for Years they could be no Impediment, because the Possession of a Lessee for Years, is the Possession of him that has the Freehold; and then the Plaintiff as Heir at Law to the Infant Son, who by his Guardian was last actually seised of the Freehold, had good Title at Law; and this is so clear and known a Case, that they need not cite many Authorities to prove it, for *Co. Lit.* 15. where he treats of the Doctrine of *Possessio Fratris*, makes it clear beyond dispute; they attempted likewise to prove, but could not make it out, that Rents were reserved upon those Leases for Years, and paid to the Defendant the Lady *Hoskins*, as Guardian, which would have made still stronger for them, besides some Proof that the Defendants the Daughters had 6000 *l.* provided for them by their Father in his Life Time, and that he declared his Estate should go and continue in his Name and Family; and thereupon it was inferred, that they being already provided for, the Plaintiff's Application was the more reasonable, and they ought to help him to a Discovery for making good his Title at Law.

On the other Side, for the Defendants it was insisted, that they were unprovided for by their Father, and therefore were in the Nature of Creditors, and ought not to be compelled in a Court of Equity to give the Plaintiff any Assistance for making out his Title to strip them of their Inheritance, that in the Case of Children it was not unusual in this Court to relieve, even against

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an Heir at Law; and therefore if a Copyholder deviſed his Land to his younger Children, or that it ſhould be ſold to raiſe Portions for his younger Children, and made no Surrender to the Uſe of his Will; yet this Court would ſupply it againſt the Heir at Law.

Alſo it was obſerved, that the Infant Son was not born till three Months after the Father's Death, and that the Mother entred immediately upon her Husband's Death, and that could not be as Guardian in Soccage to the Son, for he was not then born; and if her Entry at firſt was not as Guardian to her Son, which it could not poſſibly be, ſhe did nothing afterwards to alter the Nature of her Poſſeſſion, were it by Right or Wrong; and as to the Daughters, ſhe could not enter as Guardian in Soccage to them, for it never was heard of, that a Step-mother could be Guardian in Soccage; beſides, her Entry as to one third Part was in Right of her Dower at Common Law, and then, as to that, it was a Continuance of the Seiſin of her Husband, and took away the Deſcent of that third Part to the Son, and ſuch Entry for Dower was good, 'till avoided by the Heir at Law, or his Guardian.

'Twas likewiſe much inſiſted upon, that the Defendants were Children unprovided for, and therefore, in the Nature of Creditors, and Equity ought not to give him any Help, or make his Caſe better than it was at Common Law.

My Lord *Chancellor* ſaid, he thought it a Caſe of great Compaſſion, and that he would give the Plaintiff no Aſſiſtance, unleſs the Daughters were otherwiſe provided for; but becauſe the Plaintiff alledged, that by a Deed in the Lady *Hoskins*'s Cuſtody, it appeared, that 6000 *l.* was ſettled on the Daughters, he ſaid, that if that was fully proved it might alter the Caſe, and ordered the Deed to be produced (tho' that was likewiſe greatly oppoſed) and the Lady *Hoskins* having ſuch a Deed wherein ſuch Proviſion was made, afterwards the Matter was compromiſed.

Anony-

Caſe 226.

Anonymous.

The Manner in which Infants Truſtees are to convey the Eſtates devolved on them, purſuant to the Act of Parliament.

A Petition upon the late Act of Parliament was read, for enabling Infants of the Age of 12 Years, or upwards, on whom any Truſt-Eſtate, or Mortgage is devolved, to convey to the *Ceſtui que Truſt*, or Mortgagor on Payment of the Money to the Executors, the Petition ſet out the Conveyances in Truſt to three Perſons, and that ſuch a one being the Survivor, was dead, and the Eſtate in Law devolved upon an Infant, who was in Court; alſo the Declaration of Truſt was read, and the Conſent to the next Heir at Law to the Infant required, and then an Order was made for the Infant, by her Guardian, to convey over the Truſt-Eſtate to the *Ceſtui que Truſt*, and the Conveyance to be ſettled by the Maſter.

DE
Termino S. Hillarii,
1709.
In Curia Cancellariæ.

Bucknal & al', verſus *Roiſton*.

Caſe 227.

Where a Perſon who has a Bill of Sale of Goods for ſecuring a Sum of Money lent, ſhall be preferred to a Judgment Creditor.

ONE *Brewer*, Supercargoe of a Ship which was to go a Voyage to the *Eaſt-Indies*, having ſhipped on Board ſeveral Goods and Commodities, borrowed of the Plaintiffs 600 *l.* and gave a Bottomree Bond to pay 40 *l. per Cent.* in Caſe the Ship ſhould reign (as they called it) three Years; and at the ſame Time made a Bill of Sale to the Plaintiff of the Goods and Commodities he had on Board (which was invoyced particularly) and of the Produce and Advantage that ſhould be made thereof; and this was in the Nature of a Security, or Pledge for the Repayment of the 600 *l.* and the 40 *l. per Cent. Premium,* upon the Ship's reigning three Years as aforeſaid.

The Ship goes her Voyage, and theſe Goods were ſold, and with the Money others bought, and thoſe likewiſe were inveſted in other Goods, and ſo there had been ſeveral Barters and Exchange of ſeveral Sorts of Goods.

The Ship after three Years returns home richly laden with ſeveral Sorts of Goods; but it happened that

Brewer died upon the Sea, in his Return home, and the Defendant *Royston*, who was a Creditor of his by Judgment for 1500 *l.* obtained before the Sale of those Goods, takes out Administration, and takes Possession of the several Goods and Commodities returned home, which belonged to *Brewer.*

And now the Plaintiffs brought their Bill to have an Account and Discovery of those Goods, and to have Satisfaction for the Produce and Advantage that was made thereof.

The Defendant by his Answer insisted, that he was a Judgment Creditor of a higher Nature than the Plaintiffs, who were at most entitled but to an Account, and in the Nature of Creditors by simple Contract, and therefore could not come in 'till his Judgment was satisfied.

For the Defendant 'twas urged, that *Brewer*'s keeping Possession of the Goods after the Sale, made it fraudulent and void as to Creditors, who by this Means were induced to think him a Man of Substance, and to give him Credit as such, that the Difference has always been taken between such a Sale or Pledge of Goods, and a Mortgage of Lands; for tho' the Mortgagor does keep the Possession of Lands that is not fraudulent as to Purchasors, who may by inspecting the Deeds discover the Title; but as to Goods, if there be no Change of the Possession, there is no Alteration made of the Property, but such Sale is fraudulent and void.

And a Case of one under St. *Dunstan*'s Church was cited by Sir *Edward Northey*, where a Man took out Execution against him by Agreement between them, the Owner of the Goods was to keep the Possession of them upon certain Terms; and afterwards another gets Judgment against the same Man, and takes these Goods in Execution, and 'twas held they were well liable, and the first Execution fraudulent and void against any subsequent Creditor, by Reason there was no Change of the Posses-

Possession, and so no Alteration made of the Property; and he said, it had been ruled 40 Times in his Experience at *Guildhall*; that if a Man sells Goods, and still continues in Possession as visible Owner of them, that such Sale is fraudulent and void as to Creditors, and that the Law has been always so held.

'Twas also said, that admitting these Goods themselves should be liable by Reason of the Sale; yet the Property of them being so often changed, the Plaintiffs could not follow them now, nor could *Brewer* make over to the Plaintiffs any Interest in these Goods, which are now come home, he having then nothing in them himself, and he could not bind by his Sale a future Right or Possibility.

For the Plaintiffs 'twas urged, that these Goods were pledged for the Security of their Money, that till Execution actually lodged in the Sheriff's Hands, a Man is Owner of his Goods, and may dispose of them as he thinks fit, and they are not bound by the Judgment, which makes no lien at all upon Goods, and that *Brewer* was but in Nature of a Trustee for the Plaintiffs of these Goods, and they might follow them, and ought to have an Account of the Produce they made.

My Lord *Chancellor* was of Opinion, that the Trust of those Goods appeared upon the very Face of the Bill of Sale; that though they were sold to the Plaintiffs, yet they trusted *Brewer* to negotiate and sell them for their Advantage, and *Brewer*'s keeping Possession of them, was not to give a false Credit to him, as in other Cases which have been cited, but for a particular Purpose agreed upon at the Time of Sale; that 'tis true, in Case of a *Bankrupt*, such keeping Possession after a Sale, will make the Sale void against his Creditors by the Statutes, and so for other Sales by the Statute of fraudulent Conveyances; but here the Plaintiffs are presently intitled to the Trust of these Goods upon the Sale, and to all the Advantages consequential upon such Trust, and may follow the Goods for that Purpose; and therefore decreed an Account

count to be taken of the Produce of these Specifick Goods, and if that could be made to appear, it was to be liable to make Satisfaction to the Plaintiffs; for which Purpose 'twas said, at the Bar, that the Goods belonging to *Brewer* were mark'd with *J. B. &c.* and other Marks to distinguish them, *&c.* but if not, what fell into the Bulk of *Brewer*'s Personal Estate in general would be liable to go in a Course of Administration, and the Defendant to be preferred in Payment of his Judgment before the Plaintiffs.

Case 228.

Jones versus *Selby*.

Real Estate made liable to a Legacy, the Personal Estate proving deficient, and it being the Testator's Intention that it should be raised at all Events.

THIS Bill was (*inter alia*) to have a Legacy of 1000 *l.* devised to the Plaintiff by the Will of *Charles Amhurst* deceased, and as to that, the Case stood thus:

Charles Amhurst being seised of an Estate in Fee to the Value of about 800 *l. per Ann.* and having two Sisters, who by their Father's Will had 1000 *l.* apiece given them, which he, tho' Executor to his Father, had not paid, he makes his Will, and thereby devises his Estate to his two Sisters for their Lives discharged of the Payment of the 2000 *l.* to themselves, but wills, that after their Deaths the said 2000 *l.* should stand a Charge upon his Estate to be paid by those in Remainder, then he devises 1000 *l.* to the Plaintiff, who was his Niece, and then devises his Estate, after the Death of his two Sisters to the Defendant *Amhurst* in Tail, with several Remainders over, Remainder to his own right Heirs, provided always, that my Executrices and Executor, and Tenants in Tail, shall pay the said Sum of 1000 *l.* within six Months after my Death, and makes the two Sisters and *Amhurst*, who had the first Remainder in Tail, Executors of his Will, and dies, not leaving Personal Assets to pay this 1000 *l.* and therefore this Bill was brought to Charge the Real Estate with the Payment thereof.

For the Defendants the Sisters (one whereof was married to the Defendant Sir *Henry Selby*) 'twas insisted, that this 1000 *l.* ought to be paid out of the Personal Estate, for it was expresly devised to be paid by his Executrices and Executor, who *eo nomine*, were intitled only to the Personal Estate, and were his Representatives only for that, but admitting that it were to be a Charge on the Real Estate, in the Case the Personal Estate proved deficient; yet it was not to be paid or charged on the Estates for Life, but only by the Tenant in Tail when he came into the Remainder, for being devised to be paid by his Executrices and Executor, those Words only charged them in respect of the Personal Estate, and when he says farther, and Tenants in Tail, those Words were to create a Charge upon the Remainder, in Case the Personal Estate proved deficient, but not to effect the Estate for Life devised to the Sisters.

But on the other Side, 'twas argued, and my Lord *Chancellor* was clearly of that Opinion, that this 1000 *l.* being to be paid within six Months after his Death; if by any Construction this could be performed, it ought to be so decreed, for otherwise the Plaintiff may die during the Life Estate, and so wholly lose the Benefit of this Devise, then here the Words are as clear as can be to charge all the Estates devised with the Payment of this 1000 *l.* for he expresly provides, that the 2000 *l.* shall be paid by the Remainder-Man in Tail; but when he comes to the Devise of this 1000 *l.* to the Plaintiff, he varies his Expression, and provides that it shall be paid within six Months after his Death: By whom? By his Executrices that had the Estate for Life: And by whom else? By his Executor, who was the very Person that had the first Remainder in Tail, and then adds, and Tenants in Tail, which shews plainly, that he intended not to exempt the Estate for Life; but to Charge that and all the Remainders in Proportion with this 1000 *l.* and a Decree was made accordingly, and that the Interest from the Time the 1000 *l.* became due, should be paid by the Tenant

Tenant for Life, Remainder in Tail, whose Estate was charged with a Sum of Money, decreed to join in levying a Fine, and suffering a Recovery, and the Tenant for Life to pay one Third Part.

Tenant for Life, and their Estate to be rated a third Part of the 1000 *l.* and he in Remainder to be liable to the other two Thirds, for which Purpose they were all three to join in suffering a Common Recovery to dock the Estates Tail and Remainders, and then to make a Security of the Estate for raising this 1000 *l.* according to the aforesaid Rate.

Case 229. *Tournay* versus *Tournay*.

By Marriage Settlement, a Term is created for raising 400 *l.* apiece for younger Children to be paid them within a Year after the Father's Death, and with Interest from his Death; one of the Children dies after the Father, but within a Year after his Death, the Portion not being raised, held *per Cur.* that it should sink in the Inheritance, and not be raised for the Benefit of its Representative.

UPON the Plaintiff's Intermarriage with her Husband in 1700, he and the Plaintiff and Defendant his eldest Son and Heir Apparent, join in a Settlement of several Lands to Trustees, and their Heirs, to the Use of the Husband for Life, Remainder as to part to the Use of the Wife for Life, Remainder after their two Deaths; and as their several Estates should determine to the Trustees for 500 Years upon the Trusts after mentioned, with several Remainders over; and it is hereby declared and agreed, that the Term of 500 Years is so limited upon Trust; and to the Intent and Purpose that the said Trustees, *&c.* do and shall out of the Rents and Profits of the said Term, or by Mortgage or Sale thereof raise the Sum of 400 *l.* apiece, for any younger Child or Children to be begotten between the Husband and Wife, and to be paid to them respectively within one Year after the Commencement of the said Term of 500 Years, with Interest at 5 *per Cent. per Ann.* from the Father's Death, till paid.

They have three Daughters and one Son, the Father dies, and one of the Daughters dies afterwards, within the Year after her Father's Death.

The Plaintiff her Mother takes out Administration, and brings this Bill against the Trustees and Heir at Law, to have the 400 *l.* raised and paid with Interest.

For the Plaintiff it was inſiſted, that this 400 *l.* became due immediately upon the Father's Death, and might have been then raiſed and paid; and that the limiting it to be paid within a Year after the Commencement of the Term, was only for the Conveniency of the Truſtees in giving them a reaſonable Time to raiſe it in; and that if they had paid theſe Portions preſently, the Payment would have been good, and a proper diſcharge might have been given for it.

That this Caſe differed from the Caſes, where a Portion is to be paid at 21, or Marriage, or any other Time certain, there perhaps, if the Party dies before, and ſo has no Occaſion for it, this Court won't Charge the Heir's Inheritance for the Sake of Strangers; but here it was due preſently upon the Father's Death, for then the Term, as to part of the Lands, had 'tis Commencement; and 'tis appointed alſo, that they ſhould have Intereſt at 5 *l. per Cent.* till their Portions paid, and ſurely there cannot be Intereſt where there is no Principal.

On the other Side, 'twas argued for the Defendants, that if this were a Legacy, and to be paid out of the Perſonal Eſtate, this would be *debitum in Preſenti*; and tho' the Party died before Payment, it ſhould go to their Repreſentatives; but the Difference has always been taken ſince the Caſe of *Pawlett* and *Pawlett*, where ſuch Portions are to be paid out of the Perſonal Eſtate, and where they are to be raiſed out of the Real Eſtate, and ſo execute a Charge upon the Inheritance of the Heir; for in ſuch Caſe, if the Party for whom 'tis provided, dies before Payment, it ſhall ſink in the Inheritance for the Benefit of the Heir, and his Eſtate ſhall not be loaded only for the Benefit of Strangers.

My Lord *Chancellor* ſaid, true it is in this Caſe, the 400 *l.* apiece was raiſable by the Truſtees preſently after the Father's Death, if they had thought fit; but the Children could not have demanded it 'till after the Year, 'twas not abſolutely due upon the Commencement of the Term,
becauſe

because there was a whole Year given for the raising of it; and therefore since one of the Daughters is dead within the Year, and before such Time as she could have demanded it, in favour to the Heir, and for the Benefit of his Inheritance the Cases have all gone this Way, that such Portions should sink, and not be raised at all, and accordingly pronounced his Decree; but as to the other Children, who were likewise Plaintiffs, an Account was decreed to be taken of the Rents and Profits of the Term, and their Portions to be forthwith raised and paid by Sale or Mortgage.

DE

Termino Paſchæ,

1710.

In CURIA CANCELLARIÆ.

Holt verſus *Burleigh*.

Caſe 230.
2 Vern. 651.
S. C.
By Marriage Settlement there is a Proviſo, that if the Wife ſhall happen to ſurvive her Husband, not having Iſſue, or without Iſſue lawfully begotten between them, the Wife to have Power to diſpoſe of ſuch Lands. The Husband dies leaving Iſſue; ſome Years after, that Iſſue dies without Iſſue, and then the Wife ſells thoſe Lands, and held ſhe had ſufficient Power.

A Man makes a Settlement upon the Marriage of his Son with one *B.* and (*inter alia*) there is this Proviſo, *viz.* Provided that if the ſaid *B.* ſhall happen to ſurvive her Husband, not having Iſſue, or without Iſſue of their two Bodies lawfully begotten between them, *B.* to have Power to ſell and diſpoſe of ſuch Lands. The Husband dies, leaving Iſſue; ſome Years after, that Iſſue dies without Iſſue, and then the Wife ſells thoſe Lands.

Now this Bill was brought by the Heir at Law of the Husband, to have the Deeds and Writings from the Vendee, as not coming in Purſuant to the Power.

For him, 'twas inſiſted, that the Husband leaving Iſſue, the Wife did not ſurvive her Husband, not having Iſſue, or without Iſſue; and therefore the Power never took Effect.

My Lord *Chancellor* ſaid, there was no Occaſion in this Caſe to make any artificial Conſtruction of the Proviſo; for that the Words thereof fell in naturally with the Meaning of the Parties, and gave her a Power

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to ſell when the Iſſue failed; for where an Eſtate is made to a Man and the Heirs of his Body, and if he die without Iſſue, or without Heirs of his Body, the Remainder over, this is a good Limitation whenever the Iſſue fails; tho' in that Caſe, if he leaves Iſſue, he can't properly be ſaid to die without Iſſue. But this is a much ſtronger Caſe, for Death is a ſingle Act, and to be performed but once; and tho' the Iſſue dies without Iſſue a Year after, you can't ſay he died without Iſſue, becauſe he actually left Iſſue; and yet a Limitation over in ſuch Caſe is good; but here ſurviving is a continuing Act, and ſhe ſurvives her Husband as much a Year after his Death, as ſhe did the firſt Moment; and therefore if the Iſſue fails during her Life, ſhe actually ſurvives without Iſſue, or not having Iſſue, becauſe the Iſſue fails during her Survivorſhip, which continues after the Failure of Iſſue; and this is the plain and natural Meaning of the Words, and agrees with the Intention of the Parties, which was to give her the Diſpoſal of ſo much Lands, in Caſe the Iſſue to be provided for by the Settlement failed, and therefore diſmiſs'd the Plaintiff's Bill. *Note*, The Caſes cited were 1 *Leon.* 285. 3 *Leon.* 106. 1 *Sid.* and 1 *Lev.* *Goodyer* verſus *Clerk.*

D E

DE
Term. S. Trinitatis,
1710.
In Curia Cancellariæ.

Thompſon verſus *Waller*.

IN this Caſe it was held clearly by my Lord *Chancellor*, that upon an Appeal, either from the *Rolls* to him, or from him to the Houſe of Lords, no new Matter not in Iſſue in the Cauſe below ſhould be ſuffered or inſiſted on; and ſaid, that rather than give Way to a Precedent of ſuch general Inconvenience as this would be, he would diſmiſs the Appeal, tho' by it the Plaintiff were forced to bring a new Bill, or a Bill of Review for his Relief.

Willſon verſus *Pack* & al'.

THE Plaintiff was a Woollen Draper, and had ſold to the Defendant's Inteſtate, Cloth and other Goods to above 80 *l.* Value, for which, after the Inteſtate's Death, having brought his Action againſt one *Busby*, who by the Conſent of the Widow *Pack* had taken out Adminiſtration, and upon *Plene Adminiſtravit*, pleaded and found for the Defendant, the Plaintiff had Judgment, *de bonis Inteſtati cum Acciderint*, and the Widow

Pack being possessed of several Diamonds, Jewels, and other Things, to the Value of 200 *l.* and upwards, which she pretended to have bought out of Money allowed her for her separate Maintenance, as Pin-Money, pursuant to an Agreement made before Marriage with her Father.

The Plaintiff brought his Bill against the Widow, *Busby* the Administrator, and the Father the Trustee, to discover Assets, and to subject these Jewels to a Course of Administration, in Order to pay the Plaintiff's Debt.

For the Plaintiff, it was insisted, that admitting it had been proved these Jewels had been bought with the Money saved by the Defendant out of her separate Maintenance, or Pin-Money; yet they ought to be subject to the Plaintiff's Debts, that it was in Nature of a stipulated Paraphernalia, and being only the ornamental Part of the Wife, it was more reasonable to subject it to pay the Husband's Debts, than that his Creditors should Starve; that true it was, if such Settlement or separate Maintenance were made before Marriage, or after, in pursuance of Articles executed before, that the Husband's Creditors could not break into the Fund, or subject that to his Debts; yet these Jewels being bought with the Money arising thereby, the Property was immediately changed, and they became the Husband's; and to construe it otherwise would be to set up a separate Rule of Property in the Wife against Law and Reason.

For the Defendant it was insisted, that there was no Manner of Foundation for such Construction, that the Court had already gone farther in protecting, even the Interest of Money saved out of such separate Maintenance against the Husband's Debts.

Then the Plaintiff went into his Proofs to show that this separate Maintenance was made after Marriage, and so fraudulent and void against the Husband's Creditors, and that these Jewels were not bought with the Money saved out of the separate Maintenance.

For the Defendant 'twas insisted, that tho' the Settlement was after Marriage, yet it was in Pursuance of a Bond given by the Husband before Marriage; that upon executing such Settlement, the Bond was delivered up and cancelled; and that the Settlement was recited to be in Pursuance of an Agreement made before Marriage; but as to the Bond there was no positive Proof, it only went to their Belief that there was such a one; but neither the Father to whom it was supposed to be made, nor any other could prove it directly.

Then as to the Jewels being bought out of the separate Maintenance, that being but 80 *l. per Ann.* and the Jewels above 200 *l.* Value, and bought in two Years after the Settlement, made it plain they could not be bought with Money saved out of the separate Maintenance; and as to the recital in the Settlement, that it was in Pursuance of an Agreement before Marriage, it was insisted, that if such Bond had been given, it was easy to have mentioned the Date and other Particulars of it, that if such general recitals in Settlements made after Marriage should prevail, 'twould open a Way to defraud all Creditors, and therefore ought not to be allowed to bind the Plaintiff, who was a Stranger and a just Creditor.

Lord *Chancellor* said, that the Paraphernalia being only Superfluities and Ornaments to the Wife, was the Reason the Law had subjected them to the Husband's Debts, rather than that his Creditors should Starve; but as to such separate Allowance, if the Defendant had proved it to have been made before Marriage, and that the Jewels were bought with the Money arising thereout, they would not have been liable to the Husband's Debts; but here the Defendant had failed in both Points, that to allow such general recitals in Settlements made after Marriage, would be of dangerous Consequence; and that 'twas strange, if there was such Bond, that neither the Father to whom it was supposed to be made, nor the Witness who was supposed to draw

 it,

it, ſhould be able to ſwear to it, that the Perſon who ſold the Jewels knew nothing of any ſeparate Maintenance, and had declared, that he truſted only the Huſband, and ſhould have taken him for his Paymaſter; and therefore decreed an Account to be taken of the Value of the Jewels, and they to be ſold to ſatisfy the Plaintiff, unleſs the Lady whom he believed would be unwilling to part with them, ſhould pay the Plaintiff his Debt and the Coſts of this Suit.

Caſe 233.

Bird verſus *Hooper*.

A. by Will gives his Children ſeveral Legacies, and gives his eldeſt Son 2000 *l.* Afterwards gives him 400 *l.* to go to *Italy*, and being a Merchant, enters his Son Debtor 400 *l.* Afterwards upon a Calculation of his Eſtate, and finding it not ſufficient to pay the whole, he by a Codicil retrenches 400 *l.* out of the younger Childrens Legacies, without taking Notice of this 400 *l.* the 400 *l.* ſhall not be deducted out of the 2000 *l.* to the eldeſt Son.

A Man having ſeveral Children, makes his Will, and thereby deviſes to them ſeveral Legacies, and amongſt the reſt gives his eldeſt Son 2000 *l.* Afterwards the Father ſends his eldeſt Son to *Italy*, and gives him 400 *l.* and being a Merchant, makes an Entry in his Book on the Debtor's Side, *my Son* B. *Debtor* 400 l. then by a Codicil having taken an Account of his Eſtate, and finding it would not Anſwer all the Legacies, he retrenches 400 *l.* out of each of the younger Children's Legacies, without taking any Notice of the eldeſt Son; and by his ſaid Codicil he mentions ſeveral Debts that were owing to him, and gives them towards paying the Legacies; but takes no Notice of the 400 *l.* ſo advanced to his eldeſt Son, and ſoon after dies.

The Queſtion was, Whether this 400 *l.* ſhould be deducted out of the eldeſt Son's Legacy of 2000 *l.* he having brought his Bill for the whole Legacy.

For the Plaintiff, 'twas argued, that no Deduction ought to be made; for 1ſt, 'twas plain, that ſuch Entry had been before the making of the Will, and then he had by his Will given 2000 *l.* to the Plaintiff, he ſhould have had it all, without any Regard to ſuch Entry; that tho' here 'twas made after the Will, yet

the Testator being a Merchant, and keeping Books regularly for the Entry of all Moneys issued out or received by Way of Creditor and Debtor, this Entry was only for a *Memorandum*, to shew when and to whom this 400 *l.* was paid; that 'tis usual amongst such Persons to set down all the Money they pay, and if to the Cook or Housekeeper for the Necessaries of the Family, yet they usually enter them Debtor so much, and therefore this Entry is not to be regarded.

2*dly*, When he afterwards made his Codicil, he thereby retrenched 400 *l.* out of all his other Childrens Legacies, and yet takes no Notice of this 400 *l.* advanced to his eldest Son, which, if he had intended should be deducted, he would have mentioned it; besides, he therein reckons up several Sums of Money that were due to him from several Persons, and thereby makes an Estimate of his Estate; and if he had intended to include this 400 *l.* he would likewise have taken Notice of that, as a Debt due to him.

'Twas also further urged, that this 400 *l.* was advanced all at once, as a Sum in Gross for the setting out his eldest Son in the World, that he had been no other Charge to his Father, whereas the other Children were a constant Charge to him, that he had a particular Kindness for this Son; and if the 400 *l.* should be deducted out of this Legacy, he would have less Share of his Father's Kindness, than the other Children.

The Defendants the Executors confessed Assets, and submitted to do as the Court should direct.

The Master of the *Rolls* being only in Court, decreed the whole 2000 *l.* to the Plaintiff, and mentioned a Case of my Lord *Guernsey*, who married a Daughter of Sir *John Banks*, with whom he had a considerable Fortune in Land. Afterwards Sir *John* builds a House upon the Land, and being a Merchant makes an Entry, Lord *Guernsey* Debtor so much for building the House, and then makes his Will, and devises the Residue of his Estate

to his two Daughters; and yet it was held this House should fall into the Lump of the Fortune given the Lady *Guernsey*. Note, For the Plaintiff was cited 1 *Chan. Cases* 301.

Case 234.

Jones versus *Selby*.

The Nature of a *Donatio Causâ Mortis*, in what it differs from a Will, the Evidence to prove it must be very strong.

THIS was an Appeal from a Decree of the Master of the *Rolls*, upon one single Point, which was this:

The Plaintiff was a Relation of and House-keeper to *Charles Amhurst* deceased, and had lived with him upwards of 20 Years, *Charles Amhurst* in *March* 1702 makes his Will, and thereby gives the Plaintiff (whose Name was then *Wetherley*) 500 *l.* about two or three Months after, being minded to augment her Fortune, and having an Hair Trunk, wherein were several Things of Value, he sends for her, and calls up two of his Servants, and in their Presence, says thus, *I give to my Cousin Mrs.* Wetherley *this Hair Trunk, and all that is contained in it*, and delivers her the Key thereof, and bid the Servants take Notice, and remember it, if they should be at any Time called upon for that Purpose, and several Times after, as it was proved in the Cause, asked them if they remember'd the Hair Trunk, and once took a Candle and shewed it them, that they might remember it.

About three Years after, *Charles Amhurst* makes another Will, wherein he first revokes all other Wills by him at any Time made, and by that Will gives the Plaintiff 1000 *l.* but takes no Notice of the Gift of the Hair Trunk, or any Thing in it, and dies.

Four Days after his Death, upon opening of the Trunk, in the Presence of several Relations, and others, there was found in it several Rings, Pieces of Gold, and amongst other Things, a Tally upon the Government for 500 *l.*

The now Plaintiff Mrs. *Jones* brought her Bill for the 1000 *l.* and for this 500 *l.* Tally, and had a Decree for the 1000 *l.* but by Reason of the Parliament sitting, the other Point, as to the Tally, was heard before the Master of the *Rolls*, and he likewise decreed that to her; whereupon this Appeal was brought: 'Twas proved for the Appellant, that the Trunk was never removed from the Place where it stood at first, that Mr. *Amburst* gave out the Order from Time to Time for renewing of the Interest upon the Tally, and received it himself.

'Twas now insisted upon for the Appellant, that the Testator having given her 500 *l.* by his first Will, tho' he afterwards declared his Intention to make it up 1000 *l.* and accordingly gave her the Trunk, and all that was in it; yet there was but a *Donatio causâ Mortis*, that it was in the Nature of a Legacy, waited on the Death of the Testator, and was ambulatory and open till that Time.

That by his revoking all former Wills, this Donation, which was but in Nature of a Will, and not to receive its Completion till his Death, was revoked likewise; that however, if it were not, yet his Intention appearing by the first Will, and the subsequent Donation to give her but 1000 *l.* that the 1000 *l.* given by the Will should be taken in Recompence and Satisfaction thereof; that if a Man gives Bond for the Payment of a Sum of Money to another, and after, by his Will, gives the same Person a Legacy of as great or more Value, that shall be taken to be in Satisfaction of the Debt, *a Fortiori*, in this Case, where 'twas only a Gift that was voluntary, and not to take Effect 'till his Death.

Besides, 'twas urged, that the Plaintiff ought to have proved, that this Tally was in the Trunk at the Time of the Gift.

That 'twas probable, that if the Testator had intended to give her that over and above the 1000 *l.* he

would have ratified it by his Will, or at least have taken some Notice of it, and that being in the Nature of a Legacy, it ought not to stand against Creditors.

The Creditors likewise had brought a Cross Bill, for Satisfaction of their Debts; and therefore 'twas pray'd the Decree may be reversed.

On the other Side, 'twas argued much from the Proof of the Testator's Kindness to the Plaintiff, that the Reason he gave no more than 1000 *l.* by his Will, was, because he had given his own Sisters no more, that he intended to leave the Plaintiff in such a Condition as to be able to keep a Servant after his Death, *&c.* that they had proved the Gift of this Hair Trunk by two Servants, and his delivery of the Key; that he afterwards refused to take the Key, telling her 'twas her own, that if this Tally did not belong to the Plaintiff, the Gift would be of little Value; that he never would have used so much Solemnity in the giving of it to her, if there had been nothing in it; that 'twas strange he should call up two of his Servants, and so often ask them, if they remembred it, if he had given her nothing but an old Hair Trunk.

Then as to the *Donatio causâ Mortis*, they agreed, 'twas not to take Effect 'till his Death; but when that happened, it took Effect, *ab initio*, from the Donation made, that the Revocation of all former Wills could not revoke that, and cited *Bracton* and *Justinian*'s *Institutes* of the several Sorts of Donations, *Causa Mortis*, that by them it appeared, such Donation had no Dependance on the Will, that if the Donor died first, 'twas an absolute Gift; but if the Donee died first, then indeed it was to return back to the Donor, and not to go to the Executors or Representatives of the Donee, that this Tally should be presumed to be in the Trunk at that Time, and to presume the Plaintiff put it in after, would be to presume her guilty of a Fraud,

 which

which is a Preſumption againſt Law and Equity, and therefore it lay on the other Side to prove it was put in after.

That the taking no Notice of this Tally in his Will was an Argument, that he did not look upon it as any part of his Eſtate, but given away before, that upon opening of the Trunk this Tally was found in it, and the ſeveral Relations and others preſent, were then ſatisfied of the Plaintiff's Right thereto; however, they had been adviſed ſince, and therefore it was pray'd the Decree might be affirmed.

Lord *Chancellor* ſaid, you agree, that a *Donatio cauſâ Mortis*, is a Gift *in Preſenti*, to take Effect *in Futuro*, after the Party's Death, as a Will, and that it is revokable during his Life, as a Will is, and ſo it differs in nothing from a Will, for 'tis not a preſent Subſtantive Gift; and therefore he thought that this Caſe conſiſted but of two Points.

1ſt, Whether there be ſufficient Evidence to prove, that the Tally was in the Trunk at the Time of the Gift.

2dly, Whether this Will were not a Revocation of it.

As to the 1ſt, he premiſed, that theſe Sorts of Donations, eſpecially where they were of the ſame Kind with what was given by the Will, ought to be fully proved in all their Circumſtances; otherwiſe they were not to be countenanced, becauſe it would open a Way to Perjury and Fraud greater than the Statutes already in Force, had provided againſt: That here, the Plaintiff had not proved by any one Witneſs, that this Tally was in the Trunk at the Time of the Gift; that if it had been ſo, ſurely the Teſtator would then, or when he had Occaſion ſo often after, have told the Witneſſes of it, that 'twas ſtrange he ſhould bid them take Notice of the Trunk, and not mention the Tally, which was the principal Thing in it; that all the Plaintiff proved upon this Score was, its being there when the Trunk was opened, which was three Years after the Gift, and four Days

after

after the Teſtator's Death, that he ſet there to condemn Frauds, and therefore might preſume them, unleſs they proved the contrary.

As to the 2d Point, Whether the Will were not a Revocation, he ſaid, it could not be properly called a Revocation; but the 1000 *l.* therein given ſhould be look'd upon as a Satisfaction of the 500 *l.* given her by the firſt Will, and the 500 *l.* Tally after that: One cannot be ſaid to revoke a Debt by his Will; but yet he may ſatisfy it, by giving a Legacy of equal Value, and ſince he had revoked all former Wills, this 1000 *l.* was a Satiſfaction equivalent to a Revocation; and muſt go in Recompence of the 1000 *l.* he had before intended her, ſince ſhe could not prove he intended it otherwiſe; for if ſhe had, then the *Donatio cauſâ Mortis*, muſt have ſtood, and therefore the Decree was reverſed.

DE
Termino S. Mich.
1710.
In Curia Cancellariæ.

Clavell versus *Littleton* & al'.

Case 235.

A Settlement made by a Person going beyond Sea, tho' voluntary, not to be controuled by a Letter wrote by him afterwards to the Trustees.

SIR *Edward Littleton* having a Wife and one only Daughter, and being to go to the *East-Indies*, makes a Settlement of his Estate on four Trustees, whereby he limits to them a Term of 1000 Years out of part of his Estate, upon Trust, that they should out of the Rents, Issues, and Profits, raise and pay to his Wife, during her Life 180 *l. per Ann.* if he should so long continue beyond Sea; and 100 *l. per Ann.* to his Daughter, for her Maintenance, 'till Marriage, and then directs, that the Trustees should by Demise, Mortgage, or Sale of his Estate, or so much thereof as should be necessary for that Purpose, raise the Sum of 5000 *l.* for his Daughter's Portion, to be paid her within three Months after her Marriage, and leaves the Deed in the Trustees Hands.

About a Month after, Sir *Edward* being on Shipboard in order for his Voyage, writes a Letter to his Trustees, wherein he expresses great Concern for his Daughter, and his Desire that she should marry well, takes Notice, that he had limited 5000 *l.* to her for her Portion; but that he thinks his Estate would be too

much loaded by so great a Portion, and that he would leave some Thing for himself in Case Things should prove Cross; therefore directs, that if she married a Person of some Profession, or Trade, and of a good Estate, that she should have 2000 *l.* raised presently, and the Reversion of some part of his Estate after his Death, which would make up her Fortune in the whole about 5000 *l.* but if she married otherwise, he would not give her a Farthing, and named one *John Vaughan*, with whom he forbids her marrying, calling him a sorry, impertinent Fellow, and expressed himself, that if she married with him, or any such, she should have nothing.

The Plaintiff was a Gentleman of 7 or 800 *l. per Ann.* and somewhat related to the Family, and went to the Coach with Sir *Edward*, and he then expressed great Kindness for him, and desired him to take Care of his Daughter; some Time after Sir *Edward* was gone, the Plaintiff makes his Addresses to the Daughter, who was then about 25 Years of Age, and marries her, and she dies about a Year after, without Issue.

Thereupon the Plaintiff brought his Bill in this Court against the Trustees, and others, to have the Portion of 5000 *l.* raised and paid to him, he having taken out Letters of Administration to her; but Sir *Edward Littleton* being then living, and not made Party to the Suit, the Cause went off for that Reason.

And now Sir *Edward* being dead, the Cause was brought on again against the Trustees.

For the Defendants, 'twas insisted, that these Instructions were in the Nature of a Letter of Attorney to the Trustees, and impowered them to Act as Sir *Edward* himself might have done, and that they stood in his Place; and therefore, tho' he had made such a Provision for his Daughter, yet it was meerly voluntary; and if he had not gone beyond Sea, but had kept the Deed by him in his own Power, he might have cancelled it at Pleasure; that these Instructions were a kind of Defeazance of the Deed, tho' there was no express

Power of Revocation, that the ſame Power he himſelf would have had, was by this Letter transferred to the Truſtees; and therefore the Plaintiff ought to have applied to them for their Conſent.

That Sir *Edward* deſiring him to take Care of his Daughter, was a kind of Guardianſhip delegated to him, and could not be intended as any Encouragement for him to marry her; and a Guardian's marrying his Ward, is always looked upon as a breach of Truſt; beſides, the Plaintiff had made no Settlement on her, and Sir *Edward's* Circumſtances are very much altered; he was indebted in conſiderable Sums of Money to the *Eaſt-India* Company, and others, which it was feared his Eſtate would not be ſufficient to anſwer; that theſe Inſtructions ought to be allowed to explain his Intent; and if a Man Purchaſes an Eſtate by a Particular, but in the Conveyance itſelf leaves out ſeveral of the Parcels, this Court will ſet it aſide.

A Man Purchaſing an Eſtate by a Particular; but in the Conveyance itſelf Part of the Land is left out, Equity will ſet it aſide.

My Lord *Keeper* was very unwilling to ſuffer the Inſtructions to be read, ſaying, ſurely they can be no controul of the Deed, eſpecially, being made a Month after the Deed was executed, and cited a Caſe of *Clavering* and *Clavering* to that Purpoſe, and ſaid, it would be a Means to break through all Settlements, if ſuch Inſtructions or Memorandums ſhould be allowed to explain or alter them; that the Plaintiff was a Gentleman of a conſiderable Eſtate, and if the Wife had ſurvived, ſhe would have been intitled to Dower out of his Eſtate, tho' no Settlement had been made; that as to Creditors, this Deed would be voluntary; but they were not hurt by this Decree, having no Bill to ſet it aſide, that at preſent he could make no other Decree, but that the whole 5000 *l.* ſhall be raiſed and paid to the Plaintiff, with Intereſt, from three Months after the Marriage; but it being againſt the Heirs at Law, would not allow the Plaintiff any Coſts.

Pye

Case 236.

Pye versus *Gorges*.

Trustees in a Settlement to support Contingent Remainders joining with the Tenant for Life in any Conveyance that will destroy such Remainders, are guilty of a Breach of Trust, and Equity will set it aside.

IN this Case my Lord *Keeper* declared his Opinion clearly to be, that if Trustees in a Settlement to support Contingent Remainders, join with the Tenant for Life in any Conveyance to destroy the Contingent Remainders before they come *in esse*, that this was a Breach of Trust in them, and besides he should make no scruple to set aside the Conveyance.

3

DE
Termino S. Hillarii,
1710.
In CURIA CANCELLARIÆ.

Crosby verſus *Jonathan Middleton, Colliſon* & al'.

Caſe 227

A. agrees to be bound in a Bond, as Surety to B. and Signs and Seals it accordingly; but by the neglect of the Clerk, A's Name was not inſerted, the Obligee ſhows A. the Condition and his Name and Seal, demands Payment, and threatens to ſue him, unleſs he would give freſh Security, which A. agrees to; but after finding the Miſtake, refuſed, not being bound by Law, yet Equity will compel him.

A Bond for 500 *l.* was ſealed and delivered by the Defendant *Jonathan* and his Brother *Thomas*, for whom he was to be bound; but *Colliſon*, who drew the Bond, left out *Jonathan*'s Name. *Thomas* and the Plaintiff had ſeveral Dealings together for many Years afterwards, and 'till *Thomas* broke and went to *Jamaica*, in a Ship, whereof the Plaintiff was Part-Owner, and after that ſold his Part to one *Rycocks.*

In *May* 1700, the Obligee came to the Defendant *Jonathan*, and having folded down the Bond, ſhewed him the Condition, with his Hand and Seal, and demanded the Money, or freſh Security, which he agreed to, and propoſed Mr. *Rycocks*, who demanding a Sight of the Bond, found the Miſtake, and diſſuaded the Defendant from entring into the new Bonds, Mr. *Bird*, a Lawyer, adviſing him, that the Bond was void againſt him.

Whereupon the Plaintiff exhibits his Bill to be re-lieved against the Fraud in *Collison*, and to have a Performance of the Defendant *Jonathan*'s last Agreement.

Mr. *Vernon* for the Plaintiff insisted, they were proper in a Court of Equity to be relieved against an Accident, or Fraud, and that here have been frequent Instances of Relief in such Cases as this.

Mr. *Dobyns* for the Defendant insisted, that the Party was never bound, had committed no Fraud, but on the contrary was circumvented into the last Agreement, for had he known that his Name was not in the Bond, he never would have treated, and urged the Presumption that it was paid, and the Staleness of the Demand; if a Man makes a voluntary Deed, or Gift, in Writing, which is not effectual, this Court will not assist; and they have not proved, that they refused to lend *Thomas* the Money, unless the Defendant would become bound for it, nor any Treaty thereon, nor Money Lent, nor any Demand or Interest paid in 49 Years; and that would be sufficient Time to ground a Presumption of Payment, even at a *nisi Prius*, if the Parties had been able, and we prove the Dealings of *Thomas* with the Plaintiff almost ever since.

Lord *Keeper*. Your Defence will not prevail, for his Hand and Seal is sufficient Evidence for Equity to relieve against. I must Decree it against you upon the first Agreement; but since 49 Years is not a sufficient Time to ground a Presumption in Equity, as you would have, you may take an Issue, and try Payment or Non-Payment next Assizes.

Case 238. *Stephenson* versus *Hayward*.

9 *February*.
Lord Keeper *Harcourt*.
A Creditor who obtains Judgment after the Debtor has made a Conveyance of his Estate for Payment of his Debts, shall be paid only in Average.

ONE *Beeching* made a Mortgage of his Estate, and became indebted to *Hayward* in 60 *l.* and then convey'd to *Streater* another Defendant in Trust, to pay the Debt of *Streater*, and then all his other Debts in Average;

Average; then *Streater* tendred the Money to the Mortgagce, which he refused, and afterwards assigned the Mortgage to *Hayward*, and then *Hayward* obtained Judgment against *Beeching* on his Bond of 60 *l.* and then *Streater* sold to the Plaintiffs, who not having paid their Purchase Money, preferred their Bill against the Mortgagees, and *Hayward* to redeem.

My Lord *Keeper* ordered, that the Plaintiffs should redeem *Hayward*'s Mortgage, and deduct their Costs out of the Mortgage Money, and that the Judgment should be paid but in Proportion; for tho' *Hayward* had a Title at Law, and it was insisted, that this Judgment would affect the resulting Equity in *Beeehing*, if there was more than sufficient to pay his Debts; and none of the Creditors of *Beeching* were made Parties to the Suit; yet my Lord *Keeper* thought, that the Conveyance made for the Payment of all *Beeching*'s Debts was a good Consideration, and that being Prior to the Judgment, the subsequent Judgment could not affect the Estate; and tho' no Creditors of *Beeching* were made Parties, yet they might be brought in before the Master.

DE
Termino Paſchæ,
1711.
In Curia Cancellariæ.

Caſe 239. **Meredith versus Wynn.**

Where the Wife's Portion charged by Will on certain Lands purſuant to a Power in Settlement, ſhall go to the Adminiſtrator of the Husband, and not to the Adminiſtrator of the Wife; tho' the Husband and Wife are both dead, and the Portion not raiſed.

IN this Caſe the main Queſtion was, Whether a Wife's Portion of 1250 *l.* charged by Will on ſuch Lands, purſuant to a Power in a Settlement, ſhould go to the Adminiſtratrix of the Wife, as a choſe in Action, or to the Plaintiff, who was Adminiſtrator of the Huſband, they being both dead, and the Money not yet raiſed.

As to which, the Caſe was, that one *John Wynn*, on the Marriage of his Son *William*, ſettles ſeveral Lands on that Marriage, with a Power for *John*, by Writing or Will, to charge the Lands with 2000 *l.* for ſuch Uſes as he ſhould think fit, and after *John* by Will reciting this Power, charges the ſaid Lands with 2000 *l.* to his two Daughters *Dorothy* and *Barbara*, and directs that his Son *William* ſhould within two Months after his Death give them Security for 1000 *l.* apiece, being the 2000 *l.* he had a Power to charge; and if he ſhould refuſe ſo to do, then he made *Dorothy* and *Barbara* Coexecutors with *William*, and likewiſe gave to his ſaid

two Daughters 250 *l.* apiece, besides the said 2000 *l.* and dies.

William gives his two Sisters Bond for their Fortunes; *Barbara* Intermarries with one *Richard Middleton*, and on the Marriage Treaty, Articles were entred into, whereby *Richard* agreed to clear his Estate, being 70 *l.* *per Ann.* of the Incumbrances that were then upon it, within six Months after the Marriage should be had; and for every 1000 *l.* he should receive of *Barbara*'s Portion; to settle 10 *l.* *per Ann.* on her for her Jointure for Life, and to settle Lands on the first and other Sons of that Marriage. *Barbara* was no Party, at least never sealed these Articles; the Marriage takes Effect; *Barbara* dies within six Months, without Issue; *Richard*, on a second Marriage with one *Dorothy Pedell*, who had a Portion of 1600 *l.* in Trustees Hands, by Articles agrees to lay out the 1250 *l.* he was intitled unto, in Right of his first Wife; and this 1600 *l.* when received, in the Purchase of Lands, to be settled on *Dorothy* for a Jointure, and for a Provision for the Issue of that Marriage, which Marriage after takes Effect; then *Richard* dies before he had got in either of the Portions, the Plaintiff his Sister takes out Administration to him, and Intermarries with the Plaintiff *Meredith*, then comes to an Agreement with *Dorothy*, whereby she was to retain the 1600 *l.* her own Portion, and to release all her Right and Title to the 1250 *l.* or to any Settlement to be made on her therewith, and this is reduced into Writing, and executed; the Defendant took out Administration to *Barbara*; and against him and *John* the Grandson and Heir of old *John Wynn*, who had the Land by Descent, subject to raise this 1250 *l.* was this Bill brought to have that Portion raised and paid.

My Lord *Keeper* decreed it accordingly; because the Husband in this Case was a Purchasor of the Wife's Portion, by his Agreement, to disincumber his own Estate, and settle a Jointure on her, wherein he had proceeded so far, as to sell some of his Estate, in Order

to diſcharge the reſt; and the Death of the Wife with-out Iſſue within the ſix Months, prevented his making a Settlement purſuant to the Articles; ſo that he having done all in his Power, and being guilty of no Default, ought not to turn to his Prejudice; and the Plaintiff having now taken Adminiſtration to him, ſtands in his Place, and muſt have the Benefit thereof; beſides, upon his ſecond Marriage with *Dorothy Pedell*, he actually agreed, in Conſideration of her Portion to lay out this 1250 *l.* and ſettle Lands on her; ſo that ſhe then became intitled to this Money, as a Purchaſor, for a valuable Conſideration; and when ſhe, after her Husband's Death, choſe to have her own 1600 *l.* which belonged to the Plaintiff as Adminiſtratrix to the Huſband, and the Plaintiff agreed to it, by this the Plaintiff likewiſe became a Purchaſor of the 1250 *l.* for 1600 *l.* ſhe conſented to give up to the Widow, and therefore decreed an Account to be taken of the Perſonal Eſtate of *John* the Grandfather, and what that fell ſhort to be made up out of the Real Eſtate come to the Defendant's Hands; and if any Real Charges were paid out of the Perſonal Eſtate, the Plaintiff to ſtand in their Place for a Satisfaction of this 1250 *l.* out of the Lands, to make ſo much as the Perſonal Eſtate remainining ſhould fall ſhort to pay.

2 Vern. 401. *Note*, A Caſe of *Burnet* and *Kinaſton* was cited, where a voluntary Diſpoſition by the Husband of his Wife's Fortune, before it was got in, being ſecured by Mortgages, Bonds, *&c.* ſhould not bind the Wife, or her Repreſentatives after his Death; but here the Husband was a Purchaſor thereof for a valuable Conſideration.

Where a Deviſe ſhall be a Satisfaction for what is due to the Deviſee.

Another Point of this Caſe was, that Serjeant *Owen Wynn* had by his Will given to *Barbara* 100 *l.* as a Legacy, and another Perſon had likewiſe by his Will given her a Legacy of 50 *l.* and of both theſe Wills, *John* the Father of *Barbara* was Executor, and whether the 1250 *l.* given by the Father ſhould go in Satisfaction of theſe two Legacies of 100 and 50 was the Queſtion.

It was argued by Mr. *Vernon*, and so resolved by the Court, without much Opposition on the other Side, that this could not be taken to be in Recompence or Satisfaction of those two Legacies, because there was no Legacy given particularly to *Barbara*; but the 2000 *l.* he had a Power of charging, was given equally to his two Daughters; and if this should be a Satisfaction of *Barbara's* two Legacies, she would not have an equal Share of the 2000 *l.* since thereby she would lose the other two Legacies given her by the other Persons, and his giving the 2000 *l.* to his two Daughters, equally shows that he intended to make no Difference between them as to the Shares they were to take.

DE
Termino S. Mich.
1711.
In CURIA CANCELLARIÆ.

Cafe 240.

Hyde verfus *Hyde*.

An Infant Male may make a Will of his Perfonal Eftate at 14, a Female at 12.

IN this Cafe no Difpute was made, but that an Infant Male of 14 Years, and a Female of 12 Years, might make a Will of the Perfonal Eftate; and it was faid to be fo agreed by my Lord Keeper *Wright*, in a Cafe of *Sharp* verfus *Sharp*, wherein they followed the Rule of the Civil Law of *Juftinian*, as at thofe Ages they might confent to Marriage.

2 *Mod.* 315.

Cafe 241.
31 *Oct.* 1711.

Jones verfus *Weftcomb*.

THIS was a Cafe wherein my Lord *Keeper* took Time to confider, before he would give his Judgment, and was this.

A. devifed a Term for Years to his Wife for Life, and after her Death to the Child, fhe was then *enfient* with; but if fuch Child died before 21, then he devifed one third Part of the faid Term to his Wife, whom he made Executrix; the Wife not being *enfient* at the Time of the Devife held, 1ft. That the Devife to her was good, tho' the Contingency never happened. 2dly, That fhe fhould have the undifpofed Surplus of the Perfonal Eftate, and not to go in a Courfe of Adminiftration.

A Man poffeffed of a long Term for Years, by his Will devifed it to his Wife for Life, and after her Death to the Child, fhe was then *enfient* with; and if fuch Child died before it came to the Age of 21, then he devifed one third Part of the faid Term to his Wife, 2 her

her Executors and Adminiſtrators, and the other two thirds to other Perſons, and made his Wife Executrix of his Will, and died.

This Bill was brought againſt her by the next of Kin of the Teſtator, to have an Account and Diſtribution of the Surplus of his Eſtate, not deviſed by his Will.

And two Queſtions were made, 1ſt. Whether the Deviſe to the Wife of one third Part of the Term were good, becauſe it happened ſhe was not then *enſient* at all, and ſo the Contingency upon which the Deviſe to her was to take Place, never happened.

The other Queſtion was, Whether this Term being Part of the Perſonal Eſtate, and expreſly deviſed to her for Life, with ſuch other Contingent Intereſt on the Death of the ſuppoſed *enſient* Child before 21, ſhould ſhut her out from the Surplus of the Perſonal Eſtate, which belonged to her as Executrix, and ſo the Surplus go in a Courſe of Adminiſtration, to be diſtributed amongſt the Plaintiffs as next of Kin.

As to the firſt Point, my Lord *Keeper* now delivered his Opinion, that tho' the Wife was not *enſient* at the Time of the Will, yet the Deviſe to her of ſuch third Part of the Term, was good.

And as to the other Point, diſmiſs'd the Plaintiff's Bill, and ſo let in the Executrix to the Surplus of the Perſonal Eſtate, notwithſtanding the Deviſe to her of Part as aforeſaid.

Stapleton verſus *Cheales.*

Caſe 242.

IN this Caſe it was urged by Council at the Bar, and agreed by the Court, that if a Legacy be deviſed to one generally to be *paid*, or *payable* at the Age of 21 Years, or any other Age, and the Legatee die before that Age; yet this was ſuch an Intereſt veſted in the

A Legacy deviſed to an Infant payable, or to be paid at the Age of 21, is an Intereſt veſted, ſo that it ſhall go to the Executors or Adminiſtrators of the Infant, tho' he dies before that Age; otherwiſe if deviſed to one at 21, or if, or when he ſhall attain the Age of 21.

the Legatee, that his Executors or Adminiſtrators may Sue for and Recover it, and with this agrees the Law of the Spiritual Court, as was reported by Dr. *Awbery*, 1 *Leon.* 177. *Godb.* 182. for this is *debitum in preſenti*, tho' *ſolvendum in futuro*; but if a Legacy be deviſed to one at 21, or if, or when he ſhall attain the Age of 21 Years, and the Legatee dies before that Age, in this Caſe the Legacy is lapſed, and ſhall not go to his Executors or Adminiſtrators.

A Legacy deviſed to an Infant to carry Intereſt at a certain Rate, veſts in him ſo as to go to his Executor or Adminiſtrator.

But if in that Caſe the Teſtator had added, that in the mean Time, or until the Legatee attains that Age, that he ſhall have Intereſt for the ſaid Legacy at ſuch a Rate, from the Time of his the Teſtator's Deceaſe, this ſubſequent Clauſe explains the Intent of the Teſtator, ſo as to make the Legacy, which was the Principal, an Intereſt veſted, which ſhall go to his Executors or Adminiſtrators, tho' the Legatee die before that Age, becauſe, if the Principal were not due preſently upon the Teſtator's Deceaſe, there could no Intereſt acrue to the Legatee at that Time; and this has been ſettled in *Cloberies* Caſe, 2 *Vent.* and in *Yates* verſus *Fettiplace*, and ſeveral other Caſes in this Court.

But a Legacy to be raiſed out of a Real Eſtate, or a Term for Years ſhall ſink in the Inheritance.

But if ſuch Portion were to ariſe out of Lands, or a Term for Years, tho' it were limited to the Party generally to be paid, or payable at ſuch an Age, there for the Benefit of the Heir the Portion ſhould ſink, and not go to the Repreſentatives of the Party ſo dying.

The Maſter of the *Rolls* ſaid, the Proviſion for Payment of Intereſt in the mean Time, where the Legacy was given generally at, or if, or when the Party ſhould attain ſuch an Age, that that ſhould make it an Intereſt veſted preſently, was an Alteration of the Law from what it was held in *Co. Lit.* 292, when he read that Book (which was 50 Years ago) tho' the Reaſon of the Law as then taken, was becauſe there was no ſuch additional Clauſe to explain it.

Mason versus *Day*.

Case 243.

A Feme Purchases a Church Lease to her and her Heirs, for three Lives, and dies, leaving an Infant Daughter, two of the Lives die, the Infant's Guardian renews the Lease, this is a new Acquisition, and shall go to the Heirs of the Part of the Father

ELizabeth *Mason* having purchased a Lease to her and her Heirs, during three Lives, from the Archbishop of *Canterbury*, died, leaving *Mary* her Daughter and Heir, an Infant; two of the Lives being dead, and the Survivor in Years, the Guardians of the Infant out of the Profits of that Estate, take a new Lease from the *Archbishop*, to the Infant and her Heirs, during three other Lives, or during the Life of the surviving *Cestui que Vie*, and two others, and then the Infant dies without Issue; and the Question was, Whether this should go to the Heirs of the Part of the Father, or to the Heirs of the Part of the Mother.

'Twas argued, that it should go to the Heirs of the Part of the Mother, being a renewal only of the old Lease, and under the old Trust; and if the Infant Heir had died without Issue before renewal, living the surviving *Cestui que Vie*, there had been no Question of it, and so ought this new Lease, being renewed out of the Profits of the old Lease.

But it was answered and resolved by the Master of the *Rolls*, that this new Lease was a new Acquisition, and vested in the Daughter as a Purchasor, and therefore should go to the Heirs of the Part of the Father, the renewal by the *Archbishop* being Gratuitous and Spontaneous, and they differenced this Case from a Copyhold; for there the Lord is only a Trustee for the Heir, and his Admittance of him, tho' it be Original, yet is only in Virtue of the Trust reposed in him by Law for that Purpose, and it was decreed accordingly.

Note, My Lord *Keeper* coming into Court, and being asked his Opinion in it, said, he was of the same Opinion to prevent a rehearing.

D E

DE
Termino S. Hillarii, 1711.
In Curia Cancellariæ.

Case 244.
2 Vern. 679. S. C.

Greenhill versus *Greenhill* & al'.

A. desires *B.* to purchase an Estate for him, *B.* accordingly the 10th of *June* enters into Articles for the Purchase of an Estate, part of which was Customary Lands, and covenants to pay the Purchase Money on *Michaelmas* following, when Conveyances were to be executed, and Possession given in *June* before. *A.* made his Will, and thereby devised all his Personal Estate to be sold, and the Money to be laid out in the Purchase of Lands to be settled on *J. S.* and devises to him likewise all his Lands of Inheritance, having no others than those agreed to be purchased, *A.* died after any Conveyance executed, but without any new Publication of his Will, the Lands pass by this Devise, and no Surrender necessary of the Customary Lands, *A.* having only an equitable Interest in them.

THIS Cause came on upon an Appeal from a Decree made by my Lord Chancellor *Cowper*, and the Case upon opening appeared to be this, one *Greenhill* desired Mr. *Young* to purchase an Estate for him of about 10 or 12000 *l.* Value, in such a Place, and Mr. *Young* meeting with an Estate, which he thought would answer Expectation, agreed for the Purchase of it; and thereupon by Articles dated 10th *April* 1706, between the Vendors and their Wives of the one Part, and *Young* of the other, the Vendors agree to deliver Possession at *Michaelmas* following, and to execute sufficient Conveyances thereof, and *Young* Covenants to pay the Purchase-Money at *Michaelmas*, when Possession was delivered.

In *June* afterwards, Mr. *Greenhill*, for whom this Estate was purchased, makes his Will, and thereby devises all his Personal Estate to be sold, and the Money

to be laid out in the Purchaſe of Lands to be ſettled, *together with his Freehold Eſtate*, on the Plaintiffs; and in another Part of his Will deviſed all his Lands of Inheritance to the Plaintiffs, and their Heirs: At *Michaelmas* following Poſſeſſion was accordingly delivered to *Young*, and the Money paid, but Conveyances were not executed till about a Year after; then *Greenhill* dies without Publication of his Will, and the Plaintiffs brought this Bill againſt *Young* and the Heir at Law, to have Conveyances executed to them purſuant to the Deviſe: Some Part of the Eſtate was Cuſtomary, and lay in *Cornwall*, and by the Cuſtom there, a Surrender to the Uſe of his Will was neceſſary to paſs ſuch Lands, tho' otherwiſe they paſſed by Leaſe and Releaſe, as Lands at Common Law, and ſo were not Copyhold. The Defendant *Young* by his Anſwer confeſſed the Truſt, and the Queſtion upon this Caſe was, Whether this Will was ſufficient to paſs the Truſt of theſe Lands, and my Lord Chancellor *Cowper* decreed it was.

But now it was argued by Sir *Joſeph Jekyll* and Mr. *How*, that this Decree ought to be reverſed: They took a Diſtinction between an Agreement for the immediate Purchaſe of Lands, and ſuch Agreement for the future Purchaſe thereof, as this was, they agreed, that if the Articles had been for the preſent Purchaſe of theſe Lands, that the Vender had been a Truſtee preſently for the Purchaſor, and then ſuch Deviſe of them had been good in Equity; but here the Poſſeſſion was not to be delivered till *Michaelmas* following, nor was any Money to be paid before that Time, and then the Purchaſor had no Power to deviſe them ſooner, no more than a Deviſe of Lands which a Man ſhould, after Purchaſe, would be good, as has been ſettled in the Caſe of *Bunker* and *Cook*, which was adjudged in *B. R.* and *C. B.* and afterwards affirmed upon a Writ of Error in the Houſe of Lords; ſo if a Man had a Judgment or Statute againſt another, tho' this would bind the Lands of Freehold or Inheritance from the Time of

the Judgment given, or the Statute acknowledged; yet the Conuzee of the Judgment or Statute, has no ſuch Intereſt as he can deviſe before Execution actually taken out.

It was likewiſe urged, that theſe Cuſtomary Lands could not paſs by the Will for want of a Surrender Previous thereto.

But it was argued on the other Side by Mr. *Sollicitor-General* and Mr. *Vernon*, in Support of the Decree, that theſe Lands were bound immediately from the Execution of the Articles; that the Poſſeſſion not being to be delivered till a future Time, made no Difference in Equity; that if Mr. *Greenhill* had died before *Michaelmas*, the Equity would have deſcended to his Heir, and that the Heir might have brought a Bill againſt Mr. *Greenhill's* Executors to compel the Payment of the Purchaſe Money out of the Perſonal Eſtate; that in this Caſe the Money was bound by the Covenant, and if the Plaintiffs ſhould not have the Lands, they would loſe both Money and Lands too; for if the Money had been at Liberty, that would have paſſed by this Will to the Plaintiffs; but now that being bound by the Covenant, if they cannot have the Lands, they muſt loſe both; that this Caſe was quite different from the Caſe of *Bunker* and *Cook*, becauſe here the Lands were immediately bound by the Articles, and were in Equity as much the Teſtator's, as if he had been immediately let into Poſſeſſion.

And as to the Cuſtomary Lands, no Surrender was neceſſary; for even in Caſe of Copyhold, tho' to paſs the Lands themſelves, a Surrender to the Uſe of his Will might be neceſſary; yet the *Ceſtui que Truſt* could make no ſuch Surrender, for he had no Eſtate in the Lands, and if Copyhold Lands were in Mortgage, yet the Mortgagor might deviſe the Equity of Redemption without any Surrender, for he had no Eſtate in them whereof to make any Surrender, and for this Point the other Side gave it up.

Lord *Keeper* ſaid, he ſaw no Reaſon to vary this Decree, he thought ſuch future Intereſt was deviſeable, as well as if it had been in Poſſeſſion, and that the Lands and Money were mutually bound by the Articles, and that the Heir might have compelled the Executors to have paid this Money in Caſe there had been no Will, and therefore affirmed the Decree.

Note, It did not appear in this Caſe, that the Teſtator had any other Eſtate of Freehold or Inheritance, and therefore the Deviſe in ſuch Manner ſufficient to deſcribe this Eſtate, ſo as to carry it by the Will.

Gibbs verſus *Barnadiſton.*

Caſe. 245.

Deviſe of a Perſonal Eſtate to one and his Iſſue, or to one, and if he die without Iſſue Remainder over, the Remainder is void.

IN this Caſe it was held clearly, and decreed, that a Deviſe of a Perſonal Eſtate to one and his Iſſue, or to one, and if he die without Iſſue, Remainder over to another, that the Deviſe over is void, and the whole Intereſt veſted in the firſt Deviſee, ſo as to be liable to his Debts; and Mr. *Vernon* ſaid, the Reaſon that a Deviſe over of ſuch Perſonal Eſtate upon a Life barely was good, was, becauſe in Conſtruction of this Court, the firſt Deviſee had but the Uſe of it, and not the intire Property.

Coleſworth verſus *Brangwin*, & al', Executors of *Henry Derby.*

Caſe 246.

A. made *E.* and *C.* Executors, and deviſed ſeveral Legacies to *B.* but made no Diſpoſition of the Surplus of his Perſonal Eſtate, And the Executors ſhall come in equally for their Share of the Surplus, notwithſtanding the Legacies deviſed to one of them; but if a Bill had been exhibited by the next of Kin, Q. Whether they ſhould not both be conſidered as Truſtees as to the Surplus.

J. S. having a Debt of 50 *l.* owing to him from the Defendant, did by his Will forgive him that Debt, and gave him 50 *l.* more and ſome Houſhold Goods to the Value of 100 *l.* ſo that in all he gave him about 200 *l.* and made him and the Plaintiff Executors, and died without making any Diſpoſition of the Surplus of his Perſonal Eſtate, which was conſiderable.

And now the Plaintiff brought this Bill against the other Executor, for an Account of the Personal Estate, and that he might have the Surplus to himself, upon Pretence that the Testator having given the other Executor these Specifick Legacies intended him no more, and therefore, that the whole Surplus would belong to him.

For the Defendant it was insisted, that the Plaintiff was a meer Stranger, and the Defendant a near Relation of the Testator, that he gave him these Legacies only that he might in all Events be sure of some Thing, that he took these Legacies in another Capacity than Executor, and therefore they could not exclude him of his Share of the Surplus, which the Law cast upon him as Executor.

My Lord *Keeper* was clear of this Opinion, and said, it was much greater Question with him, Whether this Devise of particular Legacies to one Executor, should not exclude both from any Share of the Surplus, because both came in but in Representation of the Testator, and made but as one Person; and therefore suppose the Defendant had been made sole Executor, he made it a great Question, Whether this Legacy should not have excluded him from the Surplus; indeed the Reason urged against it is, that if no such Legacy had been given, he would have come in for the whole; and therefore his giving him a Part only, ought not to exclude him from the Residue, which without any such Devise of Part, the Law would have thrown upon him; but the Case of *Foster* and *Munt* settled this long since, and though that Case has now of late been shaken in the Case of the Dutchess of *Beaufort*, and in *Littlebury*'s Case, both in the House of Peers; yet they were, because the Legacy given to the Executor was no beneficial Legacy; and so a Case of one *Atkinson* at the *Rolls*, that 10 *l.* given to an Executor for Mourning, was no beneficial Legacy, so as to exclude him from the Surplus, because Mourning was a Decency required upon

ſuch an Occaſion, but this Legacy here was a beneficial one.

But this not being the Point in Queſtion, he made no Decree concerning it, but decreed the Executors ſhould come in equally for their Share of the Surplus of the Perſonal Eſtate, notwithſtanding theſe Specifick Legacies to one Executor.

Note, If the Law be as has been lately held, this ſeems no Contradiction to *Foſter* and *Munt*'s Caſe, which was decreed only on the Fraud in the Executor, as the Lord *Gurnſey* declared.

Povey verſus *Brown, Amhurſt* & al'.

Caſe 247.

IN this Caſe one *Selby*, Uncle to the Defendant's Wife, had by his Will given her 1000 *l.* Legacy, whilſt ſhe lived ſole; afterwards, on a Treaty of Marriage with the Defendant, it was agreed by Articles, that 700 *l.* of this Legacy ſhould be applied towards Payment of his Debts, after the Marriage the Defendant, without his Wife, aſſigns the remaining 300 *l.* to the Plaintiffs, who were Creditors likewiſe; and they brought this Bill againſt the Defendant and his Wife, and the Executors of *Selby*, to have a Satisfaction of their Debts out of the remaining 300 *l.* and it was decreed, that an Account ſhould be taken, and upon the Plaintiffs proving themſelves Real Creditors, and that the Aſſignment was *bona fide*, they were to have a Satisfaction accordingly, and the Reſidue, if any, of the 300 *l.* was to be put out for the Benefit of the Wife.

Whithill verſus *Phelps.*

Caſe 248.

A Freeman of *London* in Conſideration of 600 *l.* covenants, that if his Wife ſurvived him, his Executors or Adminiſtrators ſhould pay her 600 *l.* out of his Perſonal Eſtate, this is ſuch a Compoſition, as will exclude her from any Part of the Cuſtomary Share.

THE Caſe upon opening appeared to be thus, one *Mary Phelps*, Widow of *Charles Phelps*, having a conſiderable Fortune and ſeveral Children, on Treaty

for a ſecond Marriage with one *John Whithill*, agreed he ſhould only have 600 *l.* of her Fortune, and the Reſidue to be ſettled for her ſeparate Uſe, and after her Death for the Benefit of her Children, and accordingly an Indenture was prepared and executed before Marriage, whereby ſhe, with his Aſſent, aſſigns over her Fortune to Truſtees in Truſt, that ſhe ſhould receive the Profits of it for her own ſeparate Uſe, during her Life, and after her Death, that the ſame ſhould go and be divided equally amongſt her Children; and *Whithill*, in Conſideration of the ſaid intended Marriage, and Marriage Portion of 600 *l.* makes a Settlement on her, and at the End of the Deed covenants, that if the ſaid *Mary* ſhould ſurvive him, then his Executors or Adminiſtrators ſhould pay and deliver to the ſaid *Mary* 600 *l.* out of his Perſonal Eſtate: The Marriage takes Effect, *Whithill* dies without Iſſue in 1709, and about a Year after *Mary* makes her Will, and the Defendant her Son Executor, and dies; the Defendant likewiſe obtained Adminiſtration to *Whithill* the Husband; but that was afterwards revoked and granted to the Plaintiff his Mother, who brought this Bill for an Account and Diſtribution of the Inteſtate *Whithill's* Eſtate. The Defendant by his Anſwer inſiſted, that *Whithill* was a Freeman of *London*, and therefore on his Death the Widow was intitled to the 600 *l.* in the firſt Place, purſuant to the Marriage Agreement, and to a full Moiety of the remaining Perſonal Eſtate, as his Widow by the Cuſtom of *London*, and to a Moiety of the remaining Moiety, by the Statute of Diſtributions, and now ſhe being dead, the Defendant, as her Executor ſtood in her Place, and had the ſame Right as ſhe herſelf had.

It was argued for the Plaintiff, that this 600 *l.* which the Husband had covenanted, ſhould be paid her by his Executors in Caſe ſhe ſurvived, muſt be taken to be in Satisfaction of her Cuſtomary Part, tho' there were no Words to that Purpoſe; that this was a compounding for ſuch Cuſtomary Part, and being before Marriage, by

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the Custom of the City bound her from demanding any more; that in this Case she had waived any Right under the Custom, by making this particular Provision before Hand, and Mr. *Vernon* cited a Case of *Lee* and *Pett*, decreed by my Lord Chancellor *Cowper*, where a Man and a Woman before Marriage agreed by Articles to settle 2000 *l.* each upon themselves and their Issue, and a Covenant from the intended Husband, that if the Wife survived, she should have 2000 *l.* to be at her own disposal, the Wife survived, and the Husband being a Freeman, this 2000 *l.* was decreed to be not only in Satisfaction of, or as a Composition for her Customary Part by the Custom of *London*; but also to exclude her from any Share upon the Statute of Distributions, the Husband there dying Intestate; and that this Cause stood now in the Paper to be reheard, and though, perhaps, the Court might not go quite so far now, yet certainly it ought to exclude her from any Customary Part.

On the other Side it was endeavoured to distinguish this Case from that which was cited, that here it was only her 600 *l.* back again; that this could be no Composition for any Share she might be intitled to of her Husband's Personal Estate, for then it ought to have come out of the Husband's Personal Estate; but here it was only giving her back her own again.

My Lord *Keeper* decreed it to be in Satisfaction of her Customary Part, and took Notice, that the Deed was expresly worded in Consideration of the Marriage and Marriage Portion, so that he was absolute Master of that 600 *l.* and therefore it must be looked upon to come out of his Personal Estate; but as to a Moiety of the other Moiety upon the Statute of Distributions, there was no Question made of it, but that the Widow would be intitled thereto, and an Account was decreed accordingly.

Note, For the other Moiety which belonged to the Intestate, the Custom of *London* gives no Directions where

where there are no Children, and therefore, that is wholly under the Direction of the Statute of Diſtributions; but the Cuſtom of the Province of *York* extends to give ſuch Moiety to the next of Kin to the Inteſtate.

And in the principal Caſe the Maſter of the *Rolls* was of the ſame Opinion, and took Notice, that the Deed was expreſly mentioned to be made between the Parties, Citizens of *London*; ſo that the Cuſtom of *London* might well be ſuppoſed to be in their View; and therefore this Compounding for 600 *l.* in all Events, exempted her out of the Reaſon of the Cuſtom, which was to provide for thoſe who would be otherwiſe left without any Proviſion, and here ſhe would not Truſt to any to the Cuſtomary Proviſion, and therefore ought to have no Benefit of it.

Caſe 249.

Bell verſus Commiſſary *Hyde* & Ux'.

Where a Wife may be proceeded againſt without her Huſband, he not being a Menable by the Proceſs of the Court.

UPON a Motion for diſcharging of the Defendant's Wife, who was taken up on an Attachment for not appearing, and anſwering the Plaintiff's Bill, the Caſe appeared to be this: The Defendant's Wife being a Widow, and having a conſiderable Fortune, upon the Defendant's Application to her in Way of Marriage, a Settlement was made and executed, and the Marriage took Effect.

Some Time after, the Defendant being very much in Debt, was arreſted, and the Creditors were going on to take out Execution, and ſeize his Goods; but to prevent that, the Wife gave a Note, that if they would diſcharge the Action (which was for 2000 *l.*) ſhe would pay the Debt out of her own ſeparate Eſtate, and accordingly the Action was diſcharged.

But ſhe afterwards refuſing to make good her Agreement, this Bill was brought to enforce an Execution thereof.

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The Bill was brought againſt the Husband and Wife, and *Subpœnas* taken out againſt both, and actually ſerved upon the Wife at her Houſe, but the Husband could not be found; after which, neither the Husband nor Wife appearing, an Attachment was taken out againſt both, and the Husband ſtill keeping out of the Way, the Wife was taken upon the Attachment.

And ſhe now moved to be diſcharged, on ſeveral Affidavits, that her Husband was actually gone to *Rotterdam* in *Holland*, before the filing of the Bill; and therefore the Proceſs againſt her without her Husband was irregular, and that ſhe ought to be diſcharged, and it was ſaid, that at Law there could be no Proceeding againſt the Wife without her Husband, and that Equity followed the Law in this Particular.

On the other Side it was ſaid, that the Wife was not to be conſidered in this Caſe as a Feme Covert; that ſhe having an Eſtate ſettled on her before Marriage for her ſeparate Uſe, this made her as a Feme Sole, and a ſeparate Perſon from her Husband, and therefore her Agreement was binding upon her; that they had done all they could to bring in the Husband; they had made him a Party in the Bill, taken out a *Subpœna* againſt him and his Wife, and for not appearing they had taken out an Attachment likewiſe againſt both; that if they could not in this Caſe proceed againſt the Wife, the Juſtice of this Court would be eluded, and it would be very eaſy for any Man to ſettle all his Eſtate upon his Wife, and then get out of the Way, and ſo bid Defiance to his Creditors, and Sir *Joſeph Jekyll* ſaid, it was a ſaying of a very great Man, *boni Judicis eſt ampliare Juriſdictionem*, and he thought to extend the Arm of Juſtice further than uſual, when otherwiſe there would be a Failure of Juſtice, was the Duty of every Court.

That in ſome Caſes a Woman may ſue without her Husband, and nothing was more common than for a Wife in this Court to ſue, even her Husband, and therefore ſurely in this Caſe the Plaintiffs ought not to

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lose the Benefit of the Wife's Agreement, by her sending her Husband abroad, and cited a Case of *Dubois* and *Dowle*, to this Purpose.

But my Lord *Keeper* seemed to be of Opinion, that the Process in this Case without the Husband was irregular, and that they ought to stay till the Husband's Return, when they might renew the Process against both, to which it was answered, suppose the Husband never Return, must they then be totally deprived of the Benefit of this Agreement? Upon which my Lord *Keeper* said, he would ask the Master of the *Rolls* his Opinion, and be governed by that.

Afterwards the Master of the *Rolls* coming into Court, was clearly of Opinion, that the Process in this Case without the Husband was regular, that the Husband was joined in the Suit only for Conformity, and said, a Woman by her Marriage did not lose her Understanding or Discretion, but rather improved it by her Husband's teaching, and cited *Moor* versus *Hussey*, *Hob.* 95, where several Cases are cited, wherein a Feme Covert without her Husband shall be chargeable, and said, the Practice of this Court had been constantly so, upon which, the Defendant prayed Time till the first Day of next Term to put in her Answer, and on her entring her Appearance with the *Register*, and paying Costs of the Motion, it was granted, and she to be discharged out of Custody.

Note, Mr. *How* in this Case urged, that the Defendant ought not to be heard to move for her Discharge, because she not having appeared by her Clerk in Court, was not at all in Court, but a perfect Stranger, and therefore could not regularly make any Application by her Council, till she had brought herself into Court, by directing her Clerk to enter an Appearance for her; but of this no Notice was taken, either by the Court or Council on the other Side.

De
Termino Paschæ,
1712.
In Curia Cancellariæ.

Anonymous.

Case 250.

The Sheriff cannot take a Bail Bond upon an Attachment for not paying Costs, but in such Case a Messenger is to go to bring in the Party.

THE Plaintiff's Bill being dismissed with Costs, and Costs taxed to 160 *l.* a *Subpœna* was awarded against him to pay those Costs, and for not obeying it an *Attachment*, upon which *Attachment* the Sheriff of *Leicester*, to whom it was directed, took Bail, and returned a *Cepi Corpus.*

And now upon this Return, a Motion was made for a Messenger to bring in the Plaintiff, and it was urged to be the Course of the Court, that a Messenger should go in all Cases where the Sheriff takes Bail, where the Party is not bailable, as in this Case he is not, and the rather, for that in this Case the Bail Bond was taken of a Member of Parliament, against whom, the Parliament being now sitting, they could have no Remedy, and one *Hawkins*'s Case was cited, where in a like Case a Messenger was sent to bring in the Party, and so it was ordered in this Case.

Edwards

Case 251.

Edwards versus *Fashion.*

A. having a Mortgage for Years, devises, after his Debts paid, all his Personal Estate to his two Daughters, equally to be divided between them; after the Debts paid, the Daughters Purchase the Equity of Redemption and Inheritance of the mortgaged Premisses to them and their Heirs, this is a Tenancy in Common, and not a Jointenancy.

THE Case was shortly this, a Man having a Mortgage for Years, makes his Will, and thereby devises all his Personal Estate, of what Nature soever, to his Executors, in Trust, for the Payment of his Debts, and afterwards devises the Residue and Overplus of his said Personal Estate to his two Daughters, equally to be divided between them, and dies.

The Debts being satisfy'd, the Daughters contract with the Mortgagor for the Purchase of the Equity of Redemption, and Inheritance of the mortgaged Premisses to them and their Heirs, and Articles are executed on both Sides accordingly, and a Bill brought by the Daughters for a Specifick Execution of those Articles, and a Decree obtained for that Purpose; then one of the Daughters makes her Will, and thereby devises her Moiety, Share, and Interest in the said Premisses, to the Plaintiff, who brought this Bill to be relieved against the Proceedings of the other Daughter, who claimed the whole Inheritance by Survivorship, as a Jointenancy, and had ejected the Plaintiff; and the Question was, Whether this Purchase of the Inheritance were a Jointenancy, or a Tenancy in Common.

The Master of the *Rolls* decreed it to be a Tenancy in Common, for so was the Mortgage devised to the two Daughters, whereon this Purchase of the Equity of Redemption and Inheritance was founded, and therefore they having several and distinct Interests, as Tenants in Common in the Mortgage, and paying an equal Proportion for the Purchase of the Equity of Redemption and Inheritance, should have that in the same Manner, and therefore the Devise good.

Goodrick versus *Shotbolt* & al'.

Case 252.

A. on his Marriage gave a Bond of 600 *l.* with a Warrant of Attorney to confess Judgment thereon Defeazance, on Payment of 300 *l.* to his Wife, if she survived; afterwards she joined with him in a Conveyance by Fine of his Real Estate; held that this extinguished her Right, or any *Lien* created by this Judgment on the Real Estate.

THE Case as appeared upon the Pleadings was this, *William Shotbolt* on his Marriage with *Alice*, the Daughter of one Mr. *Riston*, gave a Bond of 600 *l.* to the said Mr. *Riston*, with a Warrant of Attorney, to confess Judgment thereon, and this Judgment was defeazanced on Payment of 300 *l.* to *Alice*, in Case she survived her Husband.

Afterwards, about the Year 1706, the Plaintiff agreed with *William Shotbolt* for the Purchase of his whole Estate for 900 *l.* whereof 700 *l.* was to be paid down, and in Regard the said Estate was subject to an Annuity of 20 *l. per Ann.* during the Life of a certain Person, it was agreed, that the Plaintiff should retain the other 200 *l.* in his Hands, to indemnify himself against the said Annuity, and that after the Purchase compleated, he should convey back the Estate for a Term for Years, redeemable on his Payment of the said 200 *l.* and Interest, after the falling in of the said Annuity.

Accordingly *William Shotbolt* and *Alice* his Wife by Indenture of Lease and Release, and Fine, convey the Estate to the Plaintiff and his Heirs, and the Wife at the same Time delivered up the Bond to be cancelled.

Soon after the executing of these Deeds and Fine, in Regard *William Shotbolt* was indebted to his Brother *Battalion Shotbolt*, in the Sum of 200 *l.* and upwards, it was agreed, that for securing that Sum, the Plaintiff should Mortgage the said Estate to the said *Battalion*, redeemable on his Payment of the said 200 *l.* and Interest, and accordingly the Plaintiff executed a Lease of the Premisses, wherein reciting the Annuity of 20 *l. per Ann.* and the Judgment to *Riston*; and that for indemnifying him against those two Sums, it was agreed upon his Purchase, that he should retain 200 *l.* in his

Hands; therefore he, by the Direction of *William Shotbolt* Mortgages the Premisses to *Battalion* for a Term of Years, redeemable on Payment of the said 200 *l.* and Interest.

William dies, and *Alice* survives him, and *Riston* the Conuzee in the Judgment being likewise dead, she takes out Administration to him, and now would extend this Judgment upon the Plaintiff's Estate. *Battalion Shotbolt*, the Mortgagee, pretended, that he only had a Title to the 200 *l.* secured by the Mortgage, and the Plaintiff brought an Ejectment, and recovered at Law, upon bringing his Money into Court, the Annuitant being dead, and he now likewise brought this Bill, that on Payment of the 200 *l.* to such of the Defendants as had a Right to receive the same, he might redeem and be let into the Possession of the Estate.

The Defendant *Alice* by her Answer insisted, that the 200 *l.* belonged to her by Virtue of her Judgment, which was prior to the Defendant *Battalion*'s Mortgage, and that this 200 *l.* was all she would be able to get for the 300 *l.* that Judgment was given to secure.

The Defendant *Battalion* insisted, that the 200 *l.* belonged to him as a Creditor, by Virtue of the Mortgage, and that *Alice*'s Title was extinguished by the Fine.

It was agreed on all Hands, that the Plaintiff ought to redeem on Payment of the 200 *l.* only, but whether *Alice* or *Battalion* had a Right to receive it, was the Question, and therefore this Bill was in the Nature of an interpleading Bill, that they might settle the Right between themselves, and so he not pay his Money to a wrong Hand.

For the Defendant *Alice* it was insisted, that this 300 *l.* was all the Provision she had, that it was expresly taken Notice of in the Mortgage, and the retaining of the 200 *l.* was a Security, as well against that in Case she should survive, as against the Annuity; that she surviving her Husband, and having taken out Administration to her Father the Conusee, and the Judg-

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ment being prior to the Mortgage, had now a legal Title to lay on her Judgment, and that a Court of Equity ought not to take it from her.

But for the Defendant *Battalion Shotbolt*, it was insisted, that *Alice* joining in the Fine with her Husband, this had extinguished all her Right by Virtue of the Judgment; that if she herself had been Conusee, there had been no Question of it; for tho' a Release by a Conusee of all his Right to the Land of the Conusor will not be a Bar, or prevent his taking out Execution after, yet such Right may certainly be extinguished; that as such Fine would have barred the Conuzee himself, so her joining will in Equity defeat the Interest of her Trustee; that upon the Fine, she was examined and consented to part with all her Interest in the Land; and if she should be allowed by this Judgment to take back again any Right to the Land, this would be to derogate from her own Grant.

They agreed, indeed, that her joining in the Lease and Release, would not extinguish her Interest in the Judgment; but the Fine wherein she joined, carried away all her Right and Interest in the Land; that at the Levying of the Fine she delivered up the Bond, and tho' that neither would not be sufficient to bar her without the Fine, yet it was an Argument, that she relinquished her Security; that the Reason of taking Notice of the Judgment in the Mortgage was, because that was still standing out as a legal Lien upon the Land; that her Father being then dead, and she not having taken out Administration to him, it was proper for the Purchasor to secure himself, as far as he could against it; that if it had been intended the Security for 300 *l.* should have continued, the Purchasor would have retained 300 *l.* in his Hands for the Purpose, and that 200 *l.* only being retained, was an Argument, they never intended the Purchasor should be charged therewith, which was not an adequate Security for the 300 *l.*

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My Lord *Keeper* was clearly of this Opinion, and decreed the Plaintiff should be admitted to redeem, and should have his Costs, and that the Defendant *Battalion Shotbolt* had the Right to the 200 *l.* as an honest Creditor, and decreed accordingly, and that the Defendant *Alice* should procure Satisfaction to be acknowledged on the Judgment.

Case 253.

Bottomley versus Lord *Fairfax*.

A Man before his Marriage vests the legal Estate in Trustees in Trust for him and his Heirs, Equity won't assist the Wife in recovering her Dower.

IN this Case it was clearly agreed, that if a Husband before Marriage conveys his Estate to Trustees and their Heirs, in such Manner, as to put the legal Estate out of him, tho' the Trust be limited to him and his Heirs, that of this Trust Estate the Wife after his Death shall not be endowed, and that this Court hath never yet gone so far as to allow her Dower in such Case.

DE Term. S. Trinitatis, 1712.

In Curia Cancellariæ.

Attorney-General versus *Thompson*. Case 254.

Portions devised by a Father to his younger Children, payable at 21, or Marriage, shall carry Interest from his Death, 'till that Time, if he made no other Provision for them, but otherwise if devised by a Stranger, who is under no Obligation to provide for them.

IN this Case a Difference was taken by Mr. *How*, and agreed to by the Court, that if a Father devises Portions to his Daughters, or younger Children, to be paid or payable at their respective Ages of 21 Years, or any other Time certain, without making any Provision for their Maintenance in the mean Time, and dies, that in this Case they shall have Interest for their Portions, from his Death, 'till paid, because the Father was obliged to have provided for them, if he had lived.

But if such Portions had been devised to them by a Stranger to be paid, or payable at such an Age, in this Case their Portions should not carry Interest, in the mean Time, because he being a Stranger, was under no such Obligation to provide for them, and a Case of *Brewin* and *Brewin*, was cited to have been decreed in like Manner.

Case 255.

Eure versus *Howard.*

THIS Cause came on to be heard, by Consent, upon Bill and Answer, only for the Opinion of the Court, and upon reading of several Deeds, appeared to be this.

Where the mean Remainders determine the Estate for Life, and Reversion being in the same Person shall Consolidate.

Robert Howard seised of an Estate of Inheritance, by Indenture, in 1677, covenants to levy a Fine thereof, to one *Iler* and *Broadstreet*, and their Heirs, to the Use of himself for Life, and after, to such Uses, Intents, and Purposes, as he should, by any Deed or Writing, under his Hand and Seal, executed in the Presence of two or more credible Witnesses during his natural Life, direct and appoint, and for want of such Direction and Appointment in Trust for him and his Heirs, and a Fine was levy'd accordingly.

Afterwards the said *Robert Howard* intermarrying with one *Winifred*, with whom he had Issue *Robert* his Son, and the said *Robert* the Father being seised in Right of *Winifred* his Wife of other Lands of Inheritance, they by Indentures of Lease and Release, in 1690, and Fine duly levy'd thereupon, grant and convey these Lands to Trustees and their Heirs, to the Use of *Robert* the Father, during his Life, and after to *Winifred* during her Life, Remainder to the Use of *Robert* the Son, and the Heirs Male of his Body issuing, Remainder to the Use of the Right Heirs of the Survivor of them, the said *Robert* the Father, and *Winifred* his Wife, for ever.

Afterwards upon the Marriage of *Robert* the Son with *Mary-Anne* his Wife, one of the Defendants, by Indentures of Lease and Release, 9 and 10 *July* 1698, between *Robert Howard* the Father, and *Winifred* his Wife, and *Robert* their Son of the first Part, *Anne Broadstreet*, Daughter and Heir of *Broadstreet* the surviving Trustee in the Deed of 1677, of the second Part, *Mary-Anne Wolf* of the third Part, and others of the fourth and fifth Part, in Consideration of a Marriage intended be-

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tween *Robert* the Son, and *Mary-Anne Wolf*, and of 4000 *l.* Portion, and other Confiderations, *Robert* the Father, and *Winifred* his Wife, and *Robert* their Son, grant Releafe, and convey feveral Lands, Tenements, and Hereditaments therein particularly mentioned, (being as well thofe whereof *Robert* the Father was at firft feifed in Right of *Winifred* his Wife, as others, whereof he was fole feifed) in Fee to Truftees and their Heirs, to the Ufes following, *viz.* as to part to the Ufe of *Robert* the Father for 99 Years, if he fhould fo long live, Remainder to Truftees and their Heirs, during his Life to fupport Contingent Remainders, Remainder to the Ufe of *Winifred* for Life, Remainder to *Robert* the Son for 99 Years, if he fhould fo long live, Remainder to Truftees during his Life, to fupport Contingent Remainders; and as to the other Part, to the Ufe of *Robert* the Father, and *Winifred* his Wife, for their Lives, and the Life of the longer Liver of them, Remainder to *Robert* the Son for 99 Years, if he fhould fo long live, Remainder to Truftees and their Heirs, during his Life, to fupport Contingent Remainders, Remainder as to other Part to *Robert* the Son in Poffeffion for 99 Years, if he fhould fo long live, Remainder to Truftees during his Life, to fupport Contingent Remainders; Remainder to *Mary-Anne* for her Life, for her Jointure, Remainder of the whole; and as the feveral Eftates before limited fhould refpectively determine to the firft Son of *Robert* the Son, on the Body of *Mary-Anne* to be begotten, and of the Heirs Male of the Body of fuch firft Son lawfully iffuing, and fo to the fecond, and other Sons in like Manner, Remainder to the Heirs Male of *Robert* the Son, Remainder to the Right Heirs of *Robert* the Father, for ever.

Robert the Father covenants, that he and *Winifred* his Wife would levy a Fine of all the faid Lands to the Ufes before-mentioned; and by the fame Indenture, *Anne Broadftreet*, by the Direction of *Robert* the Father, grants Releafes and conveys, and he ratifies and confirms all the Lands by the Deed of 1677, limited to

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ller and *Broadstreet*, and their Heirs, to the Use of *Robert* the Father, for 99 Years, if he should so long live, Remainder to Trustees during his Life, to support Contingent Remainders, with other Remainders over, Remainder to the Right Heirs of *Robert* the Father, for ever, a Fine was accordingly levy'd, and the Marriage took Effect, and they had Issue *William* a Son, and *Winifred* a Daughter, then *Winifred* the Mother dies, and afterwards *Robert* the Son dies without other Issue.

Robert the Father the 15th of *January* 1706, makes his Will, and thereby devises all his Manors, Lands, Tenements, and Hereditaments, in Possession, Reversion, Remainder, or in Expectancy, whatsoever, to *Charles Baggot* and *Richard Baggot*, and others, and their Heirs in Trust, by Sale or Mortgage, to raise so much as would be sufficient to pay his Debts, and the Legacies thereby given, and gives several Legacies to the Amount of 3000 *l.* and upwards, and makes *Mary* his then Wife Executrix, and dies considerably indebted.

Some Time after his Death, *William* the Grandson dies without Issue, and now this Bill was brought by the Creditors and Legatees of *Robert* the Grandfather, against *Mary* his Executrix, *Mary-Anne Howard* and *Winifred* her Daughter, *Charles* and *Richard Baggot*, and others, to have a Satisfaction of their Debts and Legacies, pursuant to the Will of old *Robert*.

The Defendant *Mary-Anne Howard* sets out the Indentures of the 9th and 10th of *July* 1698, and insists in Behalf of *Winifred* her Daughter, that the Remainder of all that was thereby limited to *Robert* the Father for 99 Years, with Remainder to his Right Heirs, vested in *Winifred* her Daughter, as Heir to *William* her Brother, as a Contingent Remainder by Purchase, and so not subject to *Robert* the Father's Disposal by Will; and whether they were, or how many, and which of them were so subject, was the only Question.

First, As to the Lands limited to *Robert* the Father for Life, with the last Remainder thereof to his own Right Heirs, there was little or no Question made of it; but that it was the old Reversion in Fee in him, and consequently liable to be disposed of, as he thought fit; but as to the other limited to him for 99 Years only, with such Remainder to his Right Heirs; there was very solemn Arguments how far he had a Power over it, and this was divided into three Points.

1*st*, Whether of those Lands not comprised in the Deed of 1677, and whereof he was seised in Fee in Possession, at the Time of the Marriage Settlement upon his Son, Remainder to his Right Heirs, should be looked upon as his old Reversion, and so under his Power of devising.

2*dly*, Whether of the Lands comprised in that Deed of 1677, the Remainder to his own Right Heirs, should be looked upon to be void, and the old Reversion vested in himself, and so pass by his Will.

3*dly*, Whether the Remainder to the Right Heirs of the Survivor of the said *Robert* and *Winifred* his Wife, of her Inheritance, limited by the Deed of 1690, were so barred or destroy'd by the Deeds of Lease and Release of 9 and 10 *July* 1698, and the Fine thereupon levied by *Robert* the Father, and *Winifred* his Wife, as to be capable of being settled to the Uses therein limited; and if so, Whether the Remainder to the Right Heirs of *Robert* the Father, was so vested in him, as to be subject to his Will.

As to the first Point, it was argued by the *Attorney* and *Solicitor-General*, and Mr. *Lechmere*, that this Remainder to the Right Heirs of *Robert* the Father, was a Contingent Remainder, and vested in his Right Heir by Purchase, and was not Part of the old Use resulting to himself, and consequently not liable to his Disposition by Will, and therefore the *Sollicitor-General* said, this Case differed intirely from the Cases of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, for in those Cases there

 was

was no Dispofition at all made of the old Ufe during his Life; and therefore it ftill continued in him, and then the Remainder to his own Right Heirs, knit and confolidated with that old Ufe, which he had not difpofed of for his Life, and confequently his Right Heirs could not be Purchafors; and the Reafon they conftrued the old Ufe to continue in him for Life, was, becaufe it might happen, that all the Eftates might determine during his Life, and then there would be no Perfon to take the Freehold whilft he lived, becaufe he could have no Heirs 'till after his Death; and fince it might happen that all the Eftates might determine, and he made no Difpofition of the Ufe during his Life, therefore the Ufe during his Life continued in him; and that upon Determination of the Intermediate Eftates being united and conjoined with the Remainder to his Right Heirs, made it one confolidated Fee in himfelf, and by Confequence his Heirs muft take by Defcent, and not by Purchafe; but where the intire Ufe was exprefly limited out of him, during his Life; fo that by no Poffibility the intermediate Eftate can determine during his Life, there the Remainder to his Right Heirs is a good Remainder, and they fhall take by Purchafe, and not by Defcent; and he faid, this Difference was taken and agreed to by the Court in the Cafe of *Tippin* and *Cofon*, 4 *Mod.* 380, in which Cafe the Cafes of *Fenwick* and *Mitford*, and *Pibus* and *Mitford* were all cited; and here in the principal Cafe he has limited the Ufe during his Life to Truftees, to fupport Contingent Remainders, and fo has difpofed of the old Ufe during his Life; and confequently there can be no old Ufe remaining in him to unite with the Remainder limited to his Right Heirs, and then they fhall take this Remainder as Heirs by Purchafe; and Mr. *Lechmere* faid, he having limited fuch Eftate to Truftees during his Life, to fupport Contingent Remainders, the Law fhall never againft his own exprefs Limitation bring back the Ufe to him again during his Life, for then it muft take it out of the

3 Truftees,

Truſtees, to whom he has by expreſs Limitation given it during his Life; and ſo having left no Uſe in himſelf during his Life, he has no Eſtate of Freehold to unite and conſolidate with the Remainder to his own Right Heirs, and conſequently they cannot take by Deſcent from him, but muſt take as Purchaſors, and then he had no Power to ſubject this Remainder to Debts or Legacies by Will.

As to the ſecond Point, Whether the Remainder to his own Right Heirs of the Lands compriſed in the Deed of 1677, was a void Remainder, and veſted in himſelf as Part of the old Uſe, this they ſaid was a much ſtronger Point; for beſides that, the Limitation to himſelf is but for 99 Years, as the former Limitations were, the legal Eſtate of this Part of the Lands was ſtanding out in the Truſtee, and then there can be no Pretence of any reſulting Uſe to him for his Life, for nothing moved from him, the whole Eſtate being in the Truſtee, and paſſed from him to the ſeveral Uſes; and therefore he being a Stranger, might well limit the Remainder to the Right Heirs of old *Robert*, ſo as to make them capable of taking by Purchaſe, ſince there could be no Uſe remaining in him after the Settlement, when he had none before.

It was likewiſe urged ſtrongly, that for another Reaſon the Right Heirs muſt be Purchaſors of this Part of the Eſtate; for by the Deed of 1677, the Uſe was limited to him but for Life only; and after his Death, to ſuch Uſes, Intents, and Purpoſes, as he ſhould direct or appoint; and for want of ſuch Appointment, to his own Right Heirs; ſo that he had Time during his whole Life to make ſuch Appointment, and conſequently the Eſtate in the mean Time muſt be lodged in the Truſtees to ſupply ſuch Appointment; and then he having only an Eſtate for Life in thoſe Lands, could not make good any of the Limitations in the Settlement of 1698, beyond his own Life; for ſuppoſe he ſhould afterwards have made an Appointment purſuant to his Power, this muſt

muſt have taken Place of the Settlement, and defeated all thoſe Uſes, as to this part of the Land, becauſe he had Power during his whole Life, to make that Appointment, and conſequently during his whole Life the Eſtate muſt continue in the Truſtees, to anſwer and ſupply that Power, and ſo 10 *Co.* 85, expreſs in Point.

They urged further, that this very Settlement of 1698, was an actual Appointment in Purſuance of his Power, for the Heir of the ſurviving Truſtee was a Party to it, and joins in the conveying thoſe very Lands; and, 'tis ſaid, to be by the Direction and Appointment of *Robert Howard* the Father, who had ſuch Power of appointing; and therefore it can be taken to be no other than an Appointment in Purſuance of his Power; and then the Eſtate lodging in the Truſtees, to ſupply and anſwer ſuch Appointment, when he limits the laſt Remainder to his own Right Heirs, they muſt take by Virtue of the Appointment, and conſequently muſt take as Purchaſors, becauſe the Eſtate was lodged in Truſtees to anſwer ſuch Appointment, and the Father had nothing but the bare Power of appointing the Uſes, and ſo can never derive an Eſtate by Deſcent to his Heirs, when he had no Fee nor legal Eſtate in himſelf; but a bare Power of appointing the Uſes, which muſt after draw out the Poſſeſſion from the Truſtees according to thoſe Uſes.

As to the third Point, it was argued, that the Remainder of *Winifred*'s Inheritance limited to the Right Heirs of her and *Robert* her Husband, was a Contingent Remainder; and *Robert* the Father being the Survivor, the ſame veſted in his Right Heirs by Purchaſe, and conſequently not ſubject to his Diſpoſition by Will; and they inſiſted, that the Fine levy'd by *Robert* the Father and *Winifred* his Wife, in 1698, had not barred or deſtroy'd this Contingent Remainder, becauſe of the intermediate Eſtate Tail to *Robert* the Son, which was ſufficient to preſerve it; and then the Fine inured only as a

Grant of what they might lawfully Grant, and did not any Ways touch or affect this Remainder.

On the other Side, it was argued by Sir *Thomas Powis*, Serjeant *Pratt*, and Sir *Peter King*, as to the first Point, that this was within the Reason of the Cases of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, and that here was a resulting Use to him during his Life, because it might happen, that all intermediate Estates might determine before his Death; for suppose the Trustees during his Life, to support the Contingent Remainders, should forfeit their Estate, and all the other Estates, determine, what then would become of the Freehold during his Life, for his Heirs could not have it; and therefore he himself must have it, as part of the old Use undisposed of, which being conjoined with the last Limitation to his Right Heirs, will make an entire Fee in himself, and consequently his Right Heirs cannot be Purchasors, no more than if he had made no Limitation at all of the Fee.

As to the second Point, it was argued, 1*st*, That the last Limitation in the Deed of 1677, being to the Trustees and their Heirs, in Trust for *Robert* and his Heirs, was executed to him in Possession, as absolutely as if it had been said to the Use of him and his Heirs; for the Statute makes no Difference between an Use and a Trust, but mentions them both promiscuously, and this, upon reading the Deeds, seemed to be given up as a clear Point.

2*dly*, Admitting it should not be so, but that the legal Estate continued in the Trustee; yet in a Court of Equity it must be looked upon, as if he himself had been in actual Possession, and made such Settlement; for that a Trust in this Court was guided by the same Rules, and capable of the same Limitations as the Possession was at Law, and no Manner of Difference betwixt them.

3*dly*, That 'till an Appointment made, it was to the Use of him and his Heirs, and an Appointment was

always wanting 'till it was made, and then he had good Power to diſpoſe of and ſettle the Remainder of thoſe Lands to the Uſes in the Marriage Settlement, becauſe there was no Appointment thereof before, and conſequently nothing to hinder him from diſpoſing thereof, as he thought fit.

4thly, Admitting this Settlement of 1698 ſhould be conſtrued to be an Appointment purſuant to his Power; yet it was only a partial one, and made no Diſpoſition of the whole Uſe during his Life; for if the Truſtees to ſupport Contingent Remainders ſhould forfeit their Eſtate, or have joined with thoſe in Remainder in conveying their Eſtate, and then all the intermediate Eſtates had determined, here would have remained an indiſpoſed Uſe during his Life; for of that he has made no Appointment, and then that being united with the laſt Limitation to his Right Heirs, makes an intire Fee in himſelf, and conſequently his Heirs muſt have taken it by Deſcent, and not by Purchaſe, and then he had good Power over it, and the Diſpoſition by his Will muſt ſtand.

As to the third Point, it was argued, that this Fine by the Husband and Wife in 1698, deſtroy'd or gave away the Remainder to the Right Heirs of the Survivor of them, becauſe they both joined in it; and in *Albany*'s Caſe, 1 *Co.* it is ſaid, that a Feoffment deſtroys all Rights, all Titles, all Poſſibilities, both preſent and future; and if a Feoffment has that Force, much more has a Fine, which is of ſo much a higher Nature.

2dly, That this Fine eſtops the Heir to claim this Eſtate againſt the Fine of his Anceſtor, he cannot ſay, *Partes Finis*, &c. but is thereby totally barred and eſtopped from claiming it.

3dly, That this was no Contingent Remainder, or if it was, yet *Robert* the Husband ſurviving, the Contingency was then at an End, and his Heirs muſt take it; but he having an Eſtate for Life therein, they could only take it by Deſcent, for then the whole Fee was veſted

in him, and consequently he had good Power to subject it by his Will to the Payment of his Debts and Legacies.

My Lord *Keeper* after all, ordered a Case to be stated upon these several Points out of the Deeds, and then he would consider of them, and give his Opinion, and if it were necessary would desire the Assistance of some of the Judges in it; but he inclined strongly, that old *Robert* had Power to subject all these Lands by Will, as his old Reversion undisposed of, and at last said, they might argue to the contrary from Sun rising to Sun setting, they would not change his Opinion.

DE Termino S. Mich. 1712.

In Curia Cancellariæ.

Case 256. *King* versus *Withers*.

A. devises his Real Estate to his Son, charged with his Debts and Legacies, and devises 2500 *l.* to his Daughter, at the Age of 21, or Marriage, provided, that if she should marry in the Life Time of her Mother, without her consent in Writing, then 500 *l.* to cease, and be applied towards Payment of the Debts. The Daughter attains 21, and marries without her Mother's Consent, the whole Portion shall be raised, for it was vested in her at the Time of the Marriage.

THIS Cause came to be heard by Consent, and upon opening the Case, appeared to be this: The Defendant's Father, by his Will in Writing, duly attested, devised to the Defendant (who was his Heir at Law) and to his Heirs, all his Lands, Tenements, and Hereditaments in the County *Berks* (except such and such Parts thereof) charged and chargeable with the Sum of 2500 *l.* to his Daughter (since married to the Plaintiff) at her Age of 21 Years, or Marriage, which should first happen, and devised the excepted Lands in Trust, to be sold for the Payment of his Debts, provided if his said Daughter should marry in the Life Time of her Mother, without her Consent first had in Writing, then 500 *l.* Part of the said 2500 *l.* should cease, and should be applied towards Payment of his Debts charged on the said excepted Lands; and appoints his Wife to be Guardian of his Daughter, and makes her Executrix and dies.

The Daughter attains her Age of 21 Years, and afterwards, without the Consent or Privity of her Mother, intermarries

intermarries with the Plaintiff, who was a Gentleman of ſome Eſtate, and called to the Bar, but had made no Settlement or Proviſion for his Wife; and therefore the Defendant the Heir at Law refuſed to raiſe or pay any Part of his Siſter's Portion, and inſiſted likewiſe, that by her Marriage, without her Mother's Conſent, 500 *l.* part of her Portion was become forfeited; whereupon the Plaintiffs brought this Bill to have the whole Portion raiſed and paid by a Sale of the Lands charged therewith.

For the Plaintiffs, it was inſiſted, that upon the Daughter's attaining her Age of 21 Years, the whole Portion became veſted in her, and that ſhe might then have demanded it; and though ſhe afterwards married without her Mother's Conſent, yet that could not diveſt or bring back the Portion, which was before veſted and ſettled as an Intereſt in her; for that Conſent in all Reaſon could be carried no farther than during her Minority, or until ſhe attained the Age of 21 Years, during which Time ſhe was appointed to be under the Tuition and Guardianſhip of her Mother; and therefore ſo long it might be reaſonable to reſtrain her from marrying without her Mother's Conſent, but not after; and tho' the Words are, if ſhe marries without her Mother's Conſent, during her Life; yet that muſt be taken only, if her Mother be living during the Time ſuch Conſent was requiſite, that is, during her Minority, for which Time ſhe was to be under her Mother's Guardianſhip; but upon her attaining her Age of 21 Years, the Power of the Mother as Guardian ceaſed, and conſequently it was never intended to confine her beyond that Time to her Mother's Conſent in Marriage.

That here was no Deviſe of the 500 *l.* over, and therefore it muſt be taken to be only *in Terrorem*, according to the Reſolution in *Fry* and *Porters*, 1 *Vent.* and conſequently the Plaintiffs ought to have the whole Portion raiſed by Sale of the Lands charged therewith, unleſs the Defendant ſhould otherwiſe provide for the Payment thereof.

On the other Side it was urged for the Defendant, that *Cujus est dare, ejus est disponere*, that a Man may impose what Terms and Conditions he thinks fit in the disposal of his Estate, that here he has expresly made the Mother's Consent requisite during her Life; and to say, that the whole Portion vested in the Daughter upon her attaining her Age of 21 Years, is nothing to the Purpose; for tho' it did, yet, without Question, the Condition may bring it back again, as if a Feoffment in Fee be made upon Condition, here the Estate is vested; yet the breach of the Condition will fetch it back again out of the Feoffee; and when the Devisor has, in express Words, restrained her from marrying, without her Mother's Consent, during her Life, you won't surely reject this Condition, and give her the whole Portion, without any Regard to her observing the Terms of it; besides, here is a Devise over; for upon her Marriage without her Mother's Consent, the 500 *l.* is to go towards Payment of Debts, in Case of the other Part of the Testator's Estate made liable thereto; and tho' there were no such Devise over, yet the 500 *l.* is forfeited by her Violation of the Condition annexed to it; and so it was held in the Case of *Bennet* and Lord *Salisbury*.

Lord *Keeper*. This Portion did not vest in the Daughter presently, for it is not given to her generally to be paid, or payable at such a Time; but 'tis given to her, at her Age of 21 Years, or Marriage; so that before that Time, no Interest or Right to it vested in her; but here she has attained the Age of 21 Years; this is not a Personal Legacy, but is to be raised out of Lands, and therefore must have the same Consideration as a Devise of the Lands would have. And I think the Rule, that where there is no Devise over, that the Condition shall be taken only *in Terrorem*, is a great deal too wide, for here in Effect is no Devise over; for tho' it be to go towards Payment of Debts, yet here appears to be no Creditors concerned, none that are in Danger of losing their Debts; and therefore I shall consider it

as it ſtands, upon the Condition itſelf; and I *think* in this Caſe the Plaintiff muſt have her whole Portion; for the Teſtator has appointed two Times, Marriage, or 21 Years, to entitle her to it, and which ſoever of them firſt happened, gave her a Right to demand it; and here ſhe has attained her Age of 21, and that ſingly gives her a Title to it; indeed, if ſhe had married before that Age, ſhe muſt have had her Mother's Conſent, otherwiſe ſhe was to loſe 500 *l.* but when ſhe attains that Age, and marries after, her Title to the whole, which was compleat by her attaining that Age, is not to be impeached after, by her Marriage without her Mother's Conſent; for, as her Marriage with her Mother's Conſent, was one Title, ſo her attaining her Age of 21 Years, was another, and which ſoever of them firſt happens, entitles her to her whole Portion; and ſhe having attained the Age of 21 Years firſt, her Title to the Portion reſts wholly upon that; and therefore there muſt be a Decree for Sale of ſo much Lands, as will be neceſſary for that Purpoſe, unleſs the Defendant will otherwiſe ſecure the Payment of it; but the Money when raiſed muſt be brought before the Maſter, 'till the Plaintiff ſhall have made ſome Settlement upon his Wife, for which Purpoſe, he is likewiſe to bring his Title Deeds before the Maſter, to ſee what Proviſion he can make for her.

Kitſon verſus *Kitſon* & al'.

Caſe 257

The Wife of a Freeman of *London* ſhall not take by her Husband's Will, and likewiſe by the Cuſtom, unleſs it be ſo declared in the Will.

FRancis *Kitſon*, Coachmaker, being a Citizen and Freeman of *London*, and ſeiſed of a good Real Eſtate, and alſo poſſeſſed of, and intitled to a conſiderable Perſonal Eſtate, makes his Will the 20th of *Sept.* 1711, and thereby deviſes to his Wife, *Anne Kitſon*, the Plaintiff, for her Life, all his Lands, Tenements, and Eſtate whatſoever, at *Ingville-Green* in the County of *Surry*; and after her Death, he deviſes the ſame to his Nephew *Edward Kitſon* of *Henley*, and his Heirs for ever, and after ſeveral Legacies and Bequeſts, he goes on, *Item*, As to

to the Houſe wherein I now dwell, together with all my Stock of Timber, and other Stock, Goods, Chattels, Debts, and Perſonal Eſtate whatſoever, and whereſoever, I give and deviſe to my ſaid Wife *Anne Kitſon*, for her Life, with Power for her to diſpoſe of 500 *l.* Part thereof, at her Death; and after her Death, I give and deviſe all my ſaid Stock, Goods, Chattels, and Perſonal Eſtate, except the ſaid 500 *l.* to and amongſt my Siſter *Elizabeth Kitſon*, *Elizabeth Thorp*, and ſeveral others of the Defendants; he likewiſe gives to his Wife for her Life all his five Houſes in *Hedge-Lane*; and after her Death he gives the ſame to his ſaid Nephew *Edward Kitſon*, his Executors and Adminiſtrators; and makes his ſaid Wife and Mr. *Robins* Executors, and dies.

Mr. *Robins* alone proves the Will, and the Widow brought this Bill againſt him, and alſo againſt the ſaid *Edward Kitſon*, *Elizabeth Kitſon*, and the reſt of the Reſiduary Legatees, and alſo againſt one *Edward Kitſon*, who was Heir at Law to the Teſtator, to eſtabliſh the Will, and to have the Lands and Eſtate of *Ingville-Green* quieted to her for Life, and likewiſe the five Houſes in *Hedge-Lane*, and likewiſe to have one Moiety of the Perſonal Eſtate, and her Widows Chamber, as her own for ever, by Virtue of the Cuſtom of *London*, as a Freeman's Widow, there being no Children, and to have the other Moiety of the Perſonal Eſtate for Life, by Virtue of the Will, and the Power of diſpoſing of 500 *l.* thereout at her Death.

The Defendant *Robins* anſwered, and ſubmitted to do as the Court ſhould direct.

The other Defendants likewiſe anſwered and inſiſted, that the Plaintiff ought to make her Election to take either by the Cuſtom of *London*, or by Will, and not by both, and brought a Croſs Bill for that Purpoſe, and to have an Account; and as to *Edward Kitſon*, the Bill was, that in Caſe the Widow ſhould elect to take by the Cuſtom, that he might be let into the immediate Poſſeſſion of the Eſtate at *Ingville-Green*, and the five Houſes

in *Hedge-Lane*; and that, as to the reſt, in Caſe of ſuch Election, they might have a Moiety of the Perſonal Eſtate forthwith.

For the Widow it was inſiſted, that as to the Eſtate of Inheritance at *Ingville-Green*, ſhe had brought the Heir at Law before the Court to eſtabliſh the Will againſt him, and alſo againſt the Deviſee in Remainder, and that there could be no Colour to take away her Eſtate for Life in that Part of the Eſtate, being expreſly and ſpecifically deviſed to her for Life, and the Deviſe thereof collateral and independent of the Deviſe of the Perſonal Eſtate.

As to the Perſonal Eſtate, it was inſiſted, that the Teſtator muſt be ſuppoſed to know, that he was a Freeman, and that as ſuch he had no Power at all over a Moiety thereof; but that by his Death the ſame veſted in his Widow as her own for ever, and conſequently when he deviſed all his Perſonal Eſtate, that could be intended no more than he had a Power over, which was his own Moiety; for as to the other Moiety, it was none of his to diſpoſe of, nor could he by his Will make better or worſe his Wife's Title thereto; therefore his Deviſe of all his Perſonal Eſtate muſt be meant, all he had a Power over, all he could give, not what the Cuſtom of *London* had already given her; and conſequently ſhe muſt take her own Moiety by the Cuſtom, and the other by his Will.

On the other Side it was argued, that the Plaintiff was very unreaſonable in her Demands, that in this Court, wherever a Perſon had a Debt owing to him, and the Debtor by his Will gave any Thing which was equivalent to, or more than the Debt, it had always been allowed to go in Diſcharge and Satisfaction of the Debt, much more in this Caſe of the Cuſtomary Part, which was in the Nature of a Debt, or Demand out of the Teſtator's Perſonal Eſtate; and therefore when he gives her all his Perſonal Eſtate for Life, it muſt be ſuppoſed he intended it in Satisfaction of her Moiety thereof due

by the Custom of *London*; that 'tis plain in this Case, that he intended her the Power of disposing of 500 *l.* only of his Personal Estate, and no more, for he not only gives her no more to dispose of at her Death; but when he comes to dispose of the Residue, takes it up again, and says, all the rest of my Personal Estate, except the said 500 *l.* I give and devise to the Defendants, so that it is plain he intended she should have Power to diminish or lessen his Personal Estate, no more than that 500 *l.* only.

And tho' this Devise could not debar or exclude her of her Customary Part, if she thinks fit to elect it, yet she ought not to take both; and of this there can be no Doubt, since the Case of *Heron* and *Heron*, where Sir *Jos. Heron* had canton'd out his Real and Personal Estate amongst his Wife and Children; and after his Death, my Lady *Heron* would have had, not only what was so given her by her Husband, but also her Customary Part as a Freeman's Widow; but was decreed by my Lord Chancellor *Cowper* to make her Election, and that she ought not to claim both; there was likewise a Case cited between *Lawrence* and *Lawrence* to the same Effect.

My Lord *Keeper* was clearly of this Opinion, and pronounced his Decree accordingly; but held, that as to the Estate on *Ingville-Green*, that had no Dependance upon, or Relation to the Devise of the Personal Estate; but that notwithstanding she made her Election (as she did in Court, to take by the Custom) yet that the Devise of that Estate to her continued good for Life; tho' it was urged by Mr. *Vernon* and *How*, that upon her electing to take by the Custom, she ought to have no Benefit at all of the Will; but that *Edward Kitson* the Devisee in Remainder ought to be let into the Possession of that Estate immediately.

But his Lordship held otherwise; and as to the five Houses in *Hedge-Lane*, they being Leasehold, were decreed to come in with the rest of the Personal Estate, and to be sold, and the Money to be divided accor-

2 dingly;

dingly; but as to them the Court ſeems not to have apprehended the Caſe rightly; for they being expreſly given the Widow for Life, and after her Death to *Edward Kitſon*, together with the Eſtate at *Ingville-Green*, they ought, as it ſeems, to have gone accordingly; for by the Decree for Sale of them, the Remainder to *Edward Kitſon* is deſtroy'd, which ſurely the Court never intended, whatever they thought fit to do as to the Widow's Eſtate for Life therein; and if the Eſtate for Life to the Widow, of the Lands of Inheritance, were good, it ſeems ſo muſt the Deviſe of thoſe Houſes too, being expreſly deviſed to her before he came to the *Reſiduum*, otherwiſe there is an Injury done to *Edward Kitſon*'s Remainder therein; but this was not taken Notice of, or explained to the Court.

There was another Point in this Caſe, which was this, *Francis Kitſon* about three Years ago purchaſed the Remainder of a Term for 1000 Years in an Eſtate at *Egham*, of one *Booth*, which *Booth* had a Decree of Foreclosure, againſt one *Jane Reading*, the Heir at Law, that upon Payment of 20 *l.* to be put out by the Senior Maſter of the Court of Chancery, the ſaid *Jane Reading* ſhould within ſix Months after ſhe came of Age, releaſe and convey the Inheritance, and Equity of Redemption to *Booth*, his Heirs and Aſſigns, unleſs Cauſe within ſix Months after ſhe came of Age; this Term was aſſigned to the Defendant *Robins*, in Truſt for Mr. *Kitſon*, to attend the Inheritance when it ſhould be convey'd; but the 20 *l.* was never paid, and no Conveyance as yet made of the Inheritance; and whether this ſhould be looked upon as Real or Perſonal Eſtate, was ſubmitted to the Court, and held, that by Reaſon of the Decree, and a Covenant from *Booth* for that Purpoſe, it muſt be deemed to be an Eſtate of Inheritance, and the Widow muſt have it for Life; and ſhe to pay one third Part of the 20 *l.* and *Edward Kitſon* the Deviſee in Remainder, two Thirds, with Intereſt proportionably, from the Time it ought to have been paid, *Booth* being become Inſolvent.

After-

Afterwards, on a Rehearing before Lord Chancellor *Parker*, the Houſes in *Hedge-Lane* were decreed to *Edward Kitſon* after the Widows Death, and her Repreſentatives to be recompenced out of the Perſonal Eſtate of the Reſiduary Legatees, that is, as ſhe renounced the Will, *Edward Kitſon* was let into the Poſſeſſion of theſe five Houſes immediately, and the Widow was to have a Moiety of the Value thereof out of the Moiety of the Teſtator's other Perſonal Eſtate, which belonged to his Reſiduary Legatees immediately by the Wife's removing the Will and claiming by the Cuſtom.

DE

Termino Paſchæ,

1713.

In Curia Cancellariæ.

Greenhill verſus *Waldoe*. Caſe 258.

IN this Caſe upon a Marriage Settlement after the common Limitations to the firſt and other Sons, a Term was limited to Truſtees for 300 Years, in Truſt, upon Failure of Iſſue Male, to raiſe with all convenient Speed, out of the Rents and Profits, or by Mortgage or Sale, 3000 *l.* for Daughters Portions, if more than one, to be equally divided between them; and if only one, ſhe to have the whole 3000 *l.* and to be paid to ſuch Daughter or Daughters, at their reſpective Ages of 18 Years, or Days of Marriage, which ſhould firſt happen, after the Death of the Father or Mother; they have Iſſue two Daughters only, and no Son, and the Father by his Will taking Notice of this Proviſion for his Daughters, deviſes to them 500 *l.* apiece more, to be paid at the ſame Time as their original Portions were payable; but in Caſe either of them died before the Age of 18 Years, then the additional Portions of 500 *l.* apiece to both was to ceaſe: The Father and Mother

By a Marriage Settlement, a Term was limited to Truſtees for raiſing, on Failure of Iſſue Male 3000 *l.* for Daughters Portions, payable at 18, or Marriage. The Father and Mother die, leaving Iſſue two Daughters only, who at the Death of the Father (who ſurvived the Mother) were 15 or 16 Years of Age, and who had, by the Father's Will 500 *l.* apiece deviſed to them payable at the ſame Time, with their Original Portions; but the Eſtate was deviſed to *J. S.* one of the Daughters, being married, and being of the Age of 20: Held on her Bill, that ſhe muſt have Maintenance from the Time of her Father's Death, 'till the Portion became due, and from thence Intereſt at 5 *per Cent.* till paid.

both die, the Daughters being then about 15 or 16 Years of Age, the Plaintiff Intermarries with one of them, and ſhe being now about 20 Years of Age, this Bill was brought againſt the Defendant, Brother and Deviſee of the Eſtate charged with theſe Portions, and againſt the Truſtee of the Term, to have the Portion raiſed, and Intereſt from the Death of the Father.

It was inſiſted, that this was but reaſonable, in regard the Father and Mother dying before the Portion became payable, there was Maintenance provided for them in the mean Time, and it might have happened, that the Daughters might have been but two or three Years of Age at the Death of their Father and Mother; and if this Court in ſuch Caſe would not help them to a Maintenance, 'till their Portions became payable, they muſt Starve; that they were Heirs at Law, and diſinherited; and therefore, if by any Conſtruction they can be helped, this Court would do it; that here the Portions are directed to be raiſed with all convenient Speed; and if they had been raiſed preſently after the Father and Mother's Death, the Brother and Deviſee could not complain, for his Eſtate was liable to the raiſing of them preſently, then when the Portions are raiſed, who is to have the Intereſt, for they have nothing to do with it in their own Right; nor the Brother and Deviſee, for he has the Eſtate, and no wrong is done to him; and therefore ſurely in ſuch Caſe the Daughters themſelves would be entitled to it; ſo in this Caſe, tho' they are now above 18 Years of Age, yet they ought to have Intereſt from the Time their Portions became raiſable.

On the other Side it was inſiſted, that here was no Direction for Intereſt or Maintenance till their Portions became payable; that this was the Agreement of the Parties at the Time of the Settlement, and could not be broke into; that if there had been no Portions at all provided for them, they might have had Reaſon to complain, but could not have been relieved; that in this Caſe, their Portions did not veſt 'till 18, or Marriage,

there being a Clause, that if either died before that Time, the Survivor was to have her Share; and if both died before that Time, the whole Portion was to sink in the Inheritance; that it being contingent, whether both or either of the Portions would become payable, neither could vest 'till the Contingency happened as to both, that these Additional Portions of 500 *l.* apiece by his Will were in lieu of Maintenance, and the Estate ought not to be further charged.

But my Lord *Chancellor* was of Opinion, that they ought to have either Interest or Maintenance from their Father's Death (he being the Survivor) and thought it much the same, whether it were called Interest or Maintenance; that the Father never intended they should Starve 'till their Portions became payable, and therefore sent it to a Master to see what was reasonable for their Maintenance from the Time of their Father's Death, and decreed the original Portions to be raised by Sale, *&c.* with Interest at 5 *l. per Cent.* from their respective Ages of 18 Years, unless the Brother should by Payment prevent such Sale, and would allow but 5 *l. per Cent.* being charged on Land, tho' it was pressed to have 6 *l. per Cent.*

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DE
Term. S. Trinitatis,
1713.
In Curia Cancellariæ.

Case 259.

Loeffes versus *Lewen* & al'.

Where a Bond shall be deemed voluntary and fraudulent against Creditors.

IN this Case the Question was, Whether the Plaintiffs, who were Creditors of one *Eyton*, should have the Benefit of a Bond for Payment of 1500 *l.* entred into by one *Bayly* to *Eyton*, or if the said Bond should be looked upon to be voluntary and fraudulent, as against the Creditors of *Bayly*, who were Defendants; and they to be accordingly first satisfy'd out of *Bayly*'s Assets, they being Creditors only by simple Contract, and as to that, the Case appeared to be thus.

One *Mason* a Vintner, and Freeman of *London*, made his Will about 24 Years since, and thereby devised one third Part of his Personal Estate to *Letitia* his Wife, and the other two Thirds to his Children, and died, leaving only two Daughters, *Letitia* and another, who afterwards died Intestate and unmarried. *Letitia* the Widow afterwards intermarried with *Bayly*, who was a Vintner likewise; and the Widow, as well before Marriage, as she and her Husband after Marriage continued to employ the whole Stock left by *Mason* in carrying on of their Trade, without making any Distribution or Division to the Children.

Some Time after, upon a Treaty of Marriage to be had between *Letitia* the Daughter and *Eyton* (the other Daughter being then dead) a Computation was made of what Fortune would be coming to *Letitia* the Daughter, and the ſame appearing to be ſhort of what *Eyton* expected, *Bayly* agreed to make up her Fortune the Sum of 4000 *l.* but there was no Writing or Memorandum of it under Hand; but *Bayly* did afterwards pay all but 1500 *l.* of the Fortune agreed on.

About four Years after the Marriage, *Bayly* makes his Will, and at the ſame Time prepares a Bond to *Eyton* of 3000 *l.* conditioned for the Payment of 1500 *l.* to him at ſuch a Time; and then ſends for *Eyton*, and his Wiſe ſhows them the Bond and Will, whereby he had likewiſe given them a Legacy, but never delivers the Bond to *Eyton*, or his Wife, but kept it in his own Cuſtody; and *Bayly* ſome Time after dying ſuddenly, this Bond was delivered over to one *Owen*, who was a Defendant, to be kept by him as an indifferent Perſon, 'till it ſhould appear how Things were like to go. *Bayly* dying conſiderably indebted, his Executors renounced, and Adminiſtration with the Will annexed, was granted to the Defendant *Lewen*, as Principal Creditor for about 2000 *l.* by Simple Contract; and *Bayly* was likewiſe indebted to ſeveral others by Simple Contract; afterwards *Eyton* becomes a Bankrupt, and this Bond of 1500 *l.* was aſſigned by the Commiſſioners to the Plaintiffs, who were his Creditors; ſo this Bill was brought to have the Bond delivered to the Plaintiffs, and to have an Account of *Bayly*'s Perſonal Eſtate, and Satisfaction thereout for the ſaid 1000 *l.* ſeveral Proofs were read on the Plaintiff's Part, to prove the due Execution of the Bond; and that ſeemed to be out of all doubt, *Eyton* and his Wife likewiſe being examined as Witneſſes, by Order of the Court, did, both by their Anſwer and Depoſitions ſwear the Agreement by *Bayly*, to be, to pay or ſecure 4000 *l.* for the Wife's Portion.

On the other Side it was proved, that if this 1500 *l.* ſhould be taken out of *Bayly*'s Aſſets, there would not be enough to pay above 4 *s.* 6 *d.* in the Pound to his Creditors, ſo the only Queſtion was, Who ſhould have the Preference?

But another Queſtion was made, Whether the dead Daughter's Portion ſhould ſurvive wholly to the other Daughter, or be diſtributed between her and her Mother according to the Statute, and as to this a Difference was taken and agreed by the Court, that as to the Orphanage Part which belonged to the Daughters, by the Cuſtom of *London* the Survivor ſhould have the whole, even after a Diviſion and Partition made between them; but as to the Teſtator's Part deviſed to them, that was under the Direction of the Statute as a Legacy, and muſt be diſtributed between the Mother and ſurviving Daughter accordingly.

And as to the other Point, the Court was of Opinion, that this Bond was to be looked upon as voluntary againſt the Creditors of *Bayly*; but my Lord ſaid, that the Agreement to pay or ſecure 4000 *l.* in Conſideration of the Marriage, though it were only by Parol, and by Conſequence not binding within the Statute of *Frauds* and *Perjuries*, yet it was binding in Conſcience; and therefore ſo far as *Bayly* afterwards executed that Contract, by Payment of Part of the Money agreed upon, it was an effectual Performance, and not to be ſet aſide in a Court of Equity, and he never would call that fraudulent which was juſt; but as to the 1500 *l.* Bond, you cannot tack that to the Parol Agreement, ſo as to make it any Evidence in Writing of that Agreement, or as a Performance of it, for that appears to have been given four Years after, and without any Application of *Eyton* or his Wife; beſides, if it had been intended to be in Execution of the former Agreement, 'tis natural to conclude it would have been immediately delivered over to the Obligee, or his Wife, which here it was not; but *Bayly* the Obligor always kept it by him, it was made at

the ſame Time with his Will, ſhown to them at the ſame Time with his Will, and after his Death found with his Will; and therefore he could take it no otherwiſe than in the Nature of a Legacy, and voluntary; and therefore decreed an Account to be taken of *Bayly*'s Perſonal Eſtate, and that to be applied in the firſt Place towards Payment of his own Creditors, and if any Surplus remained, the Plaintiffs were to come in for a Satisfaction of their Bond in the next Place before the Legatees of *Bayly*, and Coſts on all Sides to come out of *Bayly*'s Perſonal Eſtate, he being the Occaſion of this Suit; but the Plaintiffs thought there would be no Surplus at all; and therefore deſired a farther Day to conſider whether they would not chooſe to have their Bill diſmiſs'd, rather than enter into the Account, and my Lord *Chancellor* gave them Time accordingly to conſider of it.

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Termino S. Mich.

1713.

In CURIA CANCELLARIÆ.

Case 260.

Symondson versus *Tweed.*

A Court of Equity will Decree a Specifick Execution of a Parol Agreement, if it be set forth in the Bill, and confessed by Answer.

IN this Case the Court declared, and the Council agreed likewise, that if a Man brings a Bill for a Specifick Performance of a Parol Argument, setting forth the Substance of it in his Bill, and the Defendant by his Answer confesses the Agreement, that the Court may in such Case decree an Execution thereof, notwithstanding the Statute of Frauds and Perjuries, because the Defendant confessing the Agreement, there can be no Danger of Perjury from contrariety of Evidence, which was the only Mischief that Statute intended to obviate.

But in the principal Case the Defendant had not, by his Answer, confessed the Agreement charged in the Bill, which was only by Parol, to settle some Lands and Houses on the Plaintiff, in Consideration of his marrying the Defendant's Daughter, and therefore the Bill was dismiss'd; and it was said, in all Cases where the Court had decreed a Specifick Execution of a Parol Agreement, yet the same had been supported and made out by Letters in Writing, and the particular Terms stipulated therein as a Foundation for their Decree, otherwise the Court would never carry such an Agreement into Execution.

Brander verſus *Boles*.

Caſe 281.

THE Plaintiff was Aſſignee of a Commiſſion of Bankruptcy iſſued out againſt one *Boſvil*, who was a *Gun-Powder Maker*, and had contracted with the Defendant for as much *Salt-Peter* as came to 244 *l.* but not having ready Money to pay for the ſame, propoſed to make him a Mortgage of an Eſtate he had in his own Poſſeſſion, by Way of Security for the Money, and in Order thereunto left with the Defendant the Title Deeds to get the Aſſignment drawn; the Defendant carried the Deeds to an Attorney, to look into the Title, and draw the Aſſignment, and the Attorney kept them by him for ſome Time, and then died, without having drawn the Mortgage; after which, the Defendant carried the Deeds to a Scrivener for the ſame Purpoſe; but before the the Aſſignment was perfected, the Plaintiff became a Bankrupt.

And now the Plaintiff, Aſſignee of the Commiſſion, brought this Bill to have the Deeds delivered up, that ſo the Eſtate might be ſold for Satisfaction of the Creditors.

The Defendant inſiſted on the Matters aforeſaid, and his Council urged, that this was more than a Pledge of the Writing, that an Aſſignment was intended to have been made; and if it had been made, this Court would not have taken it from him, without Payment of the Money; that its not being made was an Accident, occaſioned by the Death of the Attorney, and this Court often relieves Accidents; and therefore the Plaintiff ought not to have the Deed without Payment of the Money.

But the Court decreed the Deeds to be brought before the Maſter, and to be delivered by Schedule to the Plaintiff; but, *Note*, No Reaſon was given for this Decree.

Case 262.

Andrews versus *Cradock*.

Any Person may as *Prochein Amy*, exhibit a Bill in the Name of an Infant, but can't in the Name of a Feme Covert without her Consent.

IN this Case it was said by Council, and agreed to by the Court, that any one may bring a Bill as *Prochein Amy* to an Infant without his Consent, because it is at his Peril that brings it to be answerable for the Event; but none can bring a Bill in the Name of a Feme Covert, as her *Prochein Amy*, without her Consent; and if such Bill be brought, upon her Affidavit of the Matter, it will be dismiss'd.

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Termino Paschæ,

1714.

In CURIA CANCELLARIÆ.

East-India Company versus *Clavel*, & al'. Case. 263.

SIR *Edward Littleton* being appointed by the *East-India* Company to go as President to the Bay of *Bengall*, and to transact and manage all the Affairs of the Company, there does, by Articles dated 16th of *Jan.* 1698, for himself, his Executors and Administrators, covenant and agree with the Company, and their Successors, to depart with the first Ship that should set Sail for that Place; and after his Arrival there, he would faithfully, and to the utmost of his Skill and Power transact and manage all Things in Relation to the Company, for their Benefit and Advantage, and would not imbezil, misemploy, or convert any of the Goods, or Effects of the said Company to his own Use, with several other Covenants relating to his Fidelity and good Behaviour in the said Employment; and at the same Time Sir *Edward Littleton* with Sir *Strensham Masters* and Mr. *Shepherd* as his Sureties, became jointly and severally bound in a Bond of 2000 *l.* Penalty, conditioned for Perfor-

A. agrees with the *East-India* Company to go as President to *Bengal*, and enters into a Bond of 2000 *l.* Penalty, for Performance of Articles; but before he set out, he made a Settlement of his Estate, and among other Things he declared the Trust of a Term of 1000 Years to be for the raising of 5000 *l.* as a Portion for his Daughter, who afterwards married *J. S.* a Gentleman of 700 *l.* per *Ann.* who before the Marriage was advised by Council, that the Portion was sufficiently secured, and who, afterwards on her Death, had on her Request expended 400 *l.* on her Funeral, but never made any Settlement on her. After *A.* embezils the Goods and Stock of the Company, to a considerable Value, yet they cannot break through this Provision, so as to make it voluntary and fraudulent as to them.

Performance of the ſaid Articles, and this Bond, like all others, bound themſelves, their Heirs, Executors, and Adminiſtrators.

Afterwards Sir *Edward Littleton* being to proceed on his Voyage, by Leaſe and Releaſe the 21ſt of *January* 1798, ſettles all his Eſtate on Truſtees, and their Heirs to ſeveral Uſes, and among the reſt carves out a Term of 1000 Years, and this was declared to be upon Truſt, that the Truſtees ſhould raiſe the Sum of 5000 *l.* as a Portion for his Daughter *Jane*, to be paid within three Months after her Marriage; and likewiſe a Proviſion for the Payment of his Debts, and ſoon after ſet out for *Bengall*; during the Time of his abode there, he managed the Affairs of the Company, and had generally two or three Hundred Thouſand Pounds of their Money in his Hands.

Mr. *Clavel* the Defendant, to whom Sir *Edward* had recommended the Care of his Daughter, ſome Time after Sir *Edward*'s Departure makes his Application to her in Way of Marriage, and ſhe having the Copy of her Father's Settlement in her Hands, delivers it to Mr. *Clavel*, who went to Counſel to adviſe upon it, and being adviſed, that the Portion of 5000 *l.* was ſufficiently ſecured by that Settlement, Mr. *Clavel* and the young Lady ſoon after married, but no Settlement was made upon the Marriage, tho' it was proved that Mr. *Clavel* had an Eſtate of Inheritance of about 700 *l. per Ann.* and a Perſonal Eſtate of conſiderable Value. Some Time after the Marriage, Mrs. *Clavel* died without Iſſue; and it being her Deſire, ſhe was buried amongſt her own Anceſtors at a great Diſtance, which coſt Mr. *Clavel* about 400 *l.*

After her Death, Mr. *Clavel*, her Husband took out Adminiſtration to her, and brought his Bill in this Court againſt the Truſtees, and had a Decree for Sale of the 1000 Years; and for raiſing and paying the 5000 *l.* Portion, ſeveral Purchaſors bid for the Eſtate before the Maſter, and the *Eaſt-India* Company from Time to Time,

upon Application to the Court, obtained Interlocutory Orders to put off the Sale, upon Pretence of bringing in better Purchasors: The Reason of which was, that Sir *Edward Littleton* had imbezilled, or misemploy'd Goods and Effects of the Company, to the Amount of 26000 *l.* and so had forfeited his Articles and Bond, and made himself liable to satisfy the Company that Demand; and the Company had before that Time, by their Agents and Factors in *Bengal*, seised all the Books, Papers, and Effects of Sir *Edward*, and taken him into Custody, where he died; and therefore the Company conceiving themselves interested in this Estate, obtained the Orders before mentioned for putting off the Sale; and now at last brought this Bill against Mr. *Clavel*, the Trustees, and several others, to have an Account of the Real and Personal Estate of Sir *Edward*, and that the same may, in the first Place, be subjected to the making good of their Demands.

For the Company it was insisted, that this Settlement for raising 5000 *l.* for the Daughter, was meerly voluntary and fraudulent; that altho' all voluntary Settlements were not fraudulent, yet this was apparently so, being made so immediately after the Articles and Bond given to the Company; that it must be intended this Settlement was made and prepared at the same Time, tho' made to bear date five or six Days after; that it was to take away or load that which was to be the Fund, for making good any Embezilments or Misapplications of the Company's Money or Effects; that the Company were Real Creditors for a very great Sum of Money, and prior in Time to the Settlement for the Daughter; that the Settlement was purely voluntary; and besides, the Daughter was since dead without Issue, and no Settlement had been made upon her; and therefore it was hoped, this voluntary subsequent Settlement, made in Fraud of the prior Agreement and Articles with the Company, should not prevail.

On the other Side it was urged, that the Articles bound only the Executors and Administrators of Sir

Edward Littleton; that his Heirs were not named in it, and consequently his Real Estate not affected by those Articles, that indeed the Bond had expresly charged his Heirs as well as his Executors and Administrators; but then that could bring a *Lien* upon the Real Estate, no further then the Penalty of the Bond went, which was but for 2000 *l.* that there was no Pretence in the World to call this Settlement fraudulent; for tho' it was voluntary, yet it was made upon very just and good Reason, that Sir *Edward* was going a very long and dangerous Voyage, and in all Probability would never return again; that having only one Daughter, it was fit he should set his House in Order, and make some Provision for her before he went; that it appeared not to be fraudulent, in Regard he expresly provided for the Payment of his Debts; that this to the *East-India* Company was at that Time no Debt at all, nor is any Presumption to be allowed that he would become so indebted, in Order to defeat this Settlement; that admitting the Settlement was voluntary at first, yet by an Act. *ex post Facto*, such voluntary Settlement may become good, and so it was in this Case; that Mr. *Clavel* was drawn in and invited by this Settlement to marry the young Lady; that he advised with Council before-hand upon it, and was told it was an effectual Provision for 5000 *l.* Portion; that in Dr. *Hart*'s Case in this Court, and affirmed in the House of Peers, a Letter from the Father promising to give his Daughter 1500 *l.* Portion, was held to be sufficient, not only to exempt it out of the Statute of *Frauds* and *Perjuries*, but was held likewise obligatory upon the Father to perform it, because the Person was thereby drawn in and invited to marry the Daughter; that in our Case Mr. *Clavell*, tho' he had made no Settlement, yet had a very good Estate, of which she would have been dowable if she had lived, and he has expended 400 *l.* on her Funeral to comply with her Request; that if this Settlement were voluntary in its Creation, yet being the Motive and Inducement to Mr. *Clavell* to marry her,

this had now made it valuable, and therefore it was pray'd they might have the Benefit of their Decree, and the Sale go on to the best Bidder.

Lord *Chancellor*. I think the Settlement was a very reasonable, prudent, and honest Provision, and no Colour of Fraud in it; the Articles do not bind the Real Estate at all, but the Bond only, so far as the Penalty goes, which is but 2000 *l.* therefore let an Account be taken of the Personal Estate of Sir *Edward Littleton*, and what of his Goods and Effects came to the Company upon their Seisure, and if that falls short of the 2000 *l.* the Deficiency must be made good, in the first Place, out of the Sale of those Lands, prior to the Defendant *Clavell's* Demands; and 'till that Account taken, let 2000 *l.* of the Purchase-Money be brought before the Master, and placed out at Interest to abide the Event of that Account, and the Residue be applied towards Mr. *Clavell's* Demand of 5000 *l.* and all the Parties must join in the Sale, and reserve the Consideration of Cost till the Account taken.

Boutell versus *Mohun, Tilden,* & al'.

Case 264.

What shall be a necessary Implication to disinherit an Heir at Law.

THE Plaintiff's Bill was to have an Account of the Personal Estate of *Anne Mohun* the Defendant's Testatrix, and a Satisfaction thereout of the Sum of 400 *l.* and likewise to have an Account of the Rents and Posits of the Estate in Question, from the Death of the said *Anne Mohun*, and upon the Defendants Answers and Proofs read in the Cause, the Case appeared to be in Substance this:

Anne Birch, the Plaintiff's Grandmother, and Mother of the said *Anne Mohun*, being seised in Fee of the Estate in Question, and possessed likewise of a Personal Estate, to the Value of about 2000 *l.* died Intestate several Years since; after whose Death the Real Estate came likewise equally between them, as next of Kin: The Plaintiff some Time after being sickly and infirm, and intending to go to *Mont-*

pellier

pellier for the Recovery of her Health, releaſes and conveys her Moiety of the Eſtate in Queſtion to her Aunt, and her Heirs, in Conſideration of 400 *l.* ſecured to her by her Aunt's Bond; but having a great Confidence in her Aunt, ſhe leaves this Bond with her Aunt, and then goes to *France.*

Afterwards *Anne Mohun* the Aunt, by Indentures of Leaſe and Releaſe the 25th and 26th of *March* 1700, conveys the Eſtate in Queſtion to one *Pepper,* and his Heirs, to the Uſe of him, his Executors and Adminiſtrators, for 99 Years, if the ſaid *Anne Mohun* and the Plaintiff *Boutell,* her Niece, or either of them, ſhould ſo long live, Remainder to the Uſe of herſelf and her Heirs; and then declares the Truſt of the Term to be, that ſhe the ſaid *Anne Mohun* ſhould receive the Rents and Profits thereof, for ſo many Years of the Term as ſhe ſhould live: Then comes a Proviſo, that if the ſaid *Anne Mohun,* her Executors or Adminiſtrators ſhould pay the Plaintiff the Sum of 400 *l.* then the ſaid Term was to ceaſe and be void, and the ſame 26th Day of *March* 1700, the ſaid *Anne Mohun* made her Will, and thereby deviſes to the Plaintiff the Sum of 400 *l.* being the ſame Sum of 400 *l.* ſecured to her by Bond; and likewiſe by Indenture of Releaſe, bearing even date herewith, as the Will expreſly deſcribed it to be; then after, by another Clauſe in the Will, ſhe deviſes the Eſtate in Queſtion to the Defendant *Henry Mohun* (who was her eldeſt Son and Heir) and the Heirs of his Body, after the Death of the ſaid *Elizabeth Boutell* (the Plaintiff) with Remainders over, and dies.

The Defendant *Henry Boutell* enters, and ſuffers a Common Recovery of the Eſtate, and limits the Uſes to himſelf and his Heirs; and now the Plaintiff brought her Bill to have Satisfaction of the 400 *l.* and Intereſt; and alſo an Account of the Rents and Profits of the ſaid Real Eſtate from the Death of her Aunt; and *Henry Boutell* brought likewiſe a Croſs Bill to be let into a Redemption of the Term, upon Payment of the 400 *l.*

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and Intereſt, and the ſingle Queſtion was, Whether the Plaintiff was to have this Eſtate for Life, by Virtue of the Deviſe to her for Life by Implication, or whether that Clauſe meant no more than only to continue it a Security to her for the 400 *l.* and Intereſt: The Plaintiff read one Witneſs to prove, that her Aunt declared ſhe ſhould have that Eſtate for her Life.

It was argued for her, that this Deviſe gave her an Eſtate for Life by Implication, and the Implication here was neceſſary, being deviſed to the Defendant, who was her Son and Heir; but that not to take Place 'till after the Plaintiff's Death; and conſequently the Plaintiff muſt have it during Life, becauſe no one elſe could, that the 99 Years Term was no Security of the 400 *l.* for that was determinable upon the Death of the Aunt and Niece; and if the Plaintiff, the Niece, had died before the Aunt, ſhe had no Manner of Benefit of that Term; that tho' the *Proviſo* made it in the Nature of a Mortgage, and redeemable upon Payment of the 400 *l.* and Intereſt; yet that was no abſolute compleat Security for the Money; that this Deviſe to her for Life could not be taken to be of the ſame Nature with the Term, or as a further Security for the Money; becauſe ſhe had, in the firſt Part of her Will, expreſly deviſed the 400 *l.* to the Plaintiff, and ſo had in a Manner paid or exonerated her Real Eſtate of that; and tho' ſhe took Notice, that it was the ſame 400 *l.* ſecured to her by Bond, and likewiſe by the 99 Years Term, yet that was only to prevent her claiming two ſeveral Sums of 400 *l.* and therefore the Deviſe after of her Real Eſtate was abſolute and independent, and muſt give her an Eſtate for Life, by neceſſary Implication.

On the other Side it was argued, that this Deviſe to her by Implication could be intended only to be of the ſame Nature with the Term, or as a kind of further Security to her, for the Money ſecured thereby; that as the Term was redeemable on Payment of 400 *l.* and Intereſt, ſo this Eſtate by Implication muſt be of the

ſame Nature too; that as ſhe had the Term for her Life, it was but natural when ſhe came to diſpoſe of the Inheritance to her Son, to give it him after the Plaintiff's Death, and proves only, that ſhe carried the ſame Intention throughout her Will; that the Plaintiff ſhould be ſecure of her 400 *l.* and the Eſtate not to be taken from her 'till that was paid; that this Will was made the ſame Day with the Deed, and expreſly referred to the 400 *l.* ſecured by that Deed; and therefore her giving the Eſtate to her Son after the Plaintiff's Death, could only be intended, in Purſuance and Confimation of that Eſtate the Plaintiff had before, which would have continued during her Life, and ſhews only that ſhe would not ſeem to do any Thing in Derogation or Prejudice of that Eſtate.

And Mr. *Gilbert* argued, that even at Law the Books are, that the Implication in a Deviſe to diſinherit the Heir, muſt be a neceſſary Implication; that if the Deviſe had been to the Plaintiff after the Death of a Stranger, this would not have carried it to the Plaintiff for Life, becauſe no neceſſary Implication, but that it might deſcend to the Heir at Law, in the mean Time; that upon the Circumſtances of this Caſe, it might be reaſonably intended no other Eſtate than what ſhe had before by the Term; that as that was for Life, it was natural and reaſonable not to give away the Eſtate, till after her Death; that as the Term was redeemable, ſo muſt this Eſtate too, becauſe it might be intended no other; and therefore no ſuch neceſſary Implication of an abſolute Eſtate for Life, as is allowed of in the Books of Law to the Diſheriſon of the Heir.

My Lord *Chancellor* was of the ſame Opinion, and eſpecially for this laſt Reaſon, that here was no neceſſary Implication; and therefore decreed the Plaintiff her 400 *l.* and Intereſt, and diſmiſs'd her Bill, as to the Account of the Rents and Profits, but without Coſts, for the Colour ſhe had to make ſuch Demand.

Andrews versus *Brown* & Ux'.

Case 265.

What will revive a Debt and bring it out of the Statute of Limitations.

ONE *Valentine Duncombe*, Brother of the late Sir *Charles Duncombe* (to whom the Defendant's Wife was Executrix) gave a Promissory Note in 1688, payable to one, or Bearer, and the Note had been handed from one to another, 'till at last *Valentine* became a Bankrupt, and went into *France*, and long after six Years, and the Death of *Valentine*, Sir *Charles* his Executor recovering a Debt of 5 or 6000 *l.* which was due to his Brother, put out an Advertisement in the *Gazette*, for all Persons who had any Debts owing from his Brother, to come to him, and make them out, and they should be paid; and the Plaintiff having this Note, had prosecuted for the Recovery of the Money after the Advertisement, but could never bring it to a Hearing 'till now, and now he had a Decree for 300 *l.* which was the Money due, by the Note and Interest allowed from the Time of the Bill brought; tho' my Lord said, this was in Nature of an *Indebit. Assump.* at Law.

A Debtor who publishes an Advertisement in a News Paper, that all Debts due from him should be paid, by this a Debt barred by the Statute of Limitations shall be paid.

And in this Case it was held clearly, that if a Man has a Debt due to him by Note, or a Book Debt, and has made no Demand of it for six Years, so that he is barred by the Statute of Limitations; yet if the Debtor after the six Years puts out an Advertisement in the *Gazette*, or any other News Paper, that all Persons who have any Debts owing to them from him, will apply to such a Place, that they shall be paid, this (tho' it were general, and therefore might be intended of legal subsisting Debts only) yet amounts to such an Acknowledgment of that Debt, which was barred, as will revive the Right, and bring it out of the Statute again.

One who by Will directs that his Debts shall be paid, or who makes Provision for the Payment of them, thereby revives a Debt barred by the Statute of Limitations, and makes his Executors liable.

So if in that Case the Debtor had made his Will, and directed, that all his Debts should be paid, or made any Provision for the Payment of his Debts in general: This likewise would revive such a Debt and bring it out of the Statute,

Statute, ſo that his Executors would be liable to the Payment of that Debt amongſt the reſt.

A Promiſe to pay a Debt, which is barred by the Statute of Limitations, ſufficient to maintain an Aſſumpſit, but a bare Acknowledgment of it not.

So if after the ſix Years, the Debtor, upon Application for that particular Debt, acknowledges *and Promiſes Payment* (for a bare Acknowledgment has been ruled not ſufficient) this revives the Debt, and brings it out of the Statute; becauſe, as the Note itſelf was at firſt but an Evidence of the Debt, ſo that being barred, this Acknowledgment and Promiſe is a new Evidence of the Debt, and being proved, will maintain an Aſſumpſit for Recovery of it; and it was agreed, that a little Matter would bring a Debt out of the Statute, being to reſtore a Right.

Another Point in this Caſe was, that after the Bill and Anſwer came in, and Replication filed, ſeveral Witneſſes were examined, and their Depoſitions taken, then the Plaintiff moved to withdraw his Replication, and took Exceptions to the Anſwer, and got a ſecond Anſwer, and then reply'd, and examined other Witneſſes, and now upon the Hearing would read other Depoſitions; but the other Side inſiſting they could not be read, by Reaſon the Replication was withdrawn, and ſo taken without any Replication, they were irregular, and ought to be ſuppreſſed; and accordingly my Lord ordered they ſhould be ſuppreſſed; for that it was ſaid, they ſhould have examined them anew after the ſecond Anſwer came in, and Replication filed, or have moved the Court to have had Liberty to make Uſe of them at the Hearing.

A third Point in this Caſe was, wherein the Court and Bar both agreed, that where Interrogatories are exhibited in the Examiner's Office, and Witneſſes examined thereon; that either Party may, without Application to the Court, or Order for that Purpoſe, exhibit one or more Interrogatories, or a new ſet of Interrogatories, for further Examination of the ſame, or other Witneſſes; but where a Commiſſion is taken out for Examination of Witneſſes, there no new Interrogatory, or ſet of Interrogatories can be exhibited, without

2 Motion

Motion and Order of the Court; and the Reaſon of the Difference was ſaid to be, becauſe the Examiner is an Officer of Credit, and Sworn; and therefore preſumed to be impartial, and that he will not diſcloſe the Depoſitions to either Party; but the Commiſſioners are private Perſons not ſworn, and are called Plaintiffs Commiſſioners, or Defendants Commiſſioners; and therefore without Leave of the Court, no new Interrogatories can be added before them.

Hunt verſus *Hunt* & Ux', & al'.

Caſe 266.

Where a Settlement is made void by Non-performance of a Condition, yet a Reconveyance held neceſſary.

THE Defendant was Son and Heir Apparent to the Plaintiff, who had an Eſtate of about 200 *l. per Ann.* and the Defendant being about to marry *Elizabeth Wright*, who was not above 16 Years of Age, the Plaintiff by Leaſe and Releaſe, the 14th and 15th of *October* 1708, ſettles and conveys his Eſtate to Truſtees, and their Heirs; and, as to one Part, to the Uſe of himſelf for Life, Remainder as to that Part after his Death; and as to the other Part in Poſſeſſion, to the Uſe of the Defendant, for his Life, Remainder to the intended Wife, for her Life, for her Jointure, Remainder to the firſt and other Sons, *&c.* in the uſual Form, and in the Releaſe was a Proviſo, that if the Marriage did not take Effect, or if it took Effect, and *Elizabeth* ſhould not, when ſhe came of Age, by Fine, or otherwiſe, join in charging an Eſtate ſhe was then intitled to, of about 250 *l. per Ann.* with the Sum of 2000 *l.* to be paid to the Plaintiff; then the ſaid Indentures of Leaſe and Releaſe and Settlement were to be abſolutely void, to all Intents and Purpoſes.

The Marriage took Effect, and about half a Year ago the Wife attained her Age of 21 Years; but finding her own Eſtate of more Value than that ſettled upon her in Jointure, ſhe and her Huſband refuſed to join in charging it with the 2000 *l.* whereupon this Bill was brought againſt them, and the Truſtees to have a Reconveyance.

It was insisted for the Defendants, that here needed none, because by the Proviso, on the Defendant's Refusal, the Estate limited to them, was to cease and be void; but the Court thought that not sufficient without a Reconveyance, being in Case of a Freehold.

Then it was insisted for the Plaintiff, and the Bill was for that Purpose likewise, that he might have an Account and Satisfaction of the Mesne Profits, received by the Defendants from the Time of the Settlement; and it was said, that by the Proviso, the Estate being to cease and be void, on the Defendant's Refusal, the Plaintiff ought to be restored to all Benefits and Advantages which he had parted with, as if no Settlement had been made, and consequently to the Rents and Profits received by the Defendants; but my Lord *Chancellor* decreed a Reconveyance, and an Account of the Rents and Profits only from the Defendant's Refusal after his Wife came of Age, and no Costs on either Side; for it was said, this was not a Condition precedent, but subsequent to the vesting of the Estate in the Defendants.

What is a Condition subsequent and not precedent.

3

DE
Term. S. Trinitatis,
1714.
In Curia Cancellariæ.

Jennor versus *Harper*.

Case 267.

A Parol Devise of 20 *l.* *per Ann.* out of Lands to a Charity, tho' before the Statute of *Frauds* not good as on Appointment, by the 43 *Eliz.*

ONE *Jennor* made his Will in Writing some Time in the Year 1651, and afterwards, the 5th of *December*, in the same Year, make a *Codicil* in Writing, and the same Day makes another Nuncupative Codicil (upon which the present Question arose) and thereby devises out of his Lands and Estate, in such a Place, 20 *l.* *per Ann.* for the Erection of a School, and Maintenance of the Schoolmaster for ever, this Nuncupative Schedule was after his Death put into Writing, and proved as such by three Witnesses: The School was built, and a Schoolmaster put in, and continued for several Years by the Executors of *Jennor*'s Will; but afterwards the Heir at Law refusing to continue the Payment, no School had been there kept for now about 30 Years past; some Time since a Commission of Charitable Uses was taken out, and the Commissioners decreed the Devise good; and the Heir at Law to pay 20 *l.* *per Ann.* according to the Nuncupative Schedule, and now upon Exceptions to that Decree, the Question was, Whether this were a good Devise.

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It was urged for the Charity, that this, tho' it were only a parol Devise, was a good Appointment within the 43 *Eliz.* and that that Act made no Difference between an Appointment by Parol, and an Appointment by Writing; and that this being made before the Statute of *Frauds* and *Perjuries*, tho' it were only by Parol, and so not good within 32 *H.* 8. was yet a good Appointment within the 43 *Eliz.* which being subsequent in Time, had repealed the former Statute as to this, and that a Devise by Tenant in Tail to a Charity, though not good against the Issue, upon the Statute, *de donis*, yet has been several Times held good against him, as an Appointment, by the 43 *Eliz.* which had abrograted that Act, as to such Charitable Devises.

But on the other Side it was urged, that these Devises to Charities, as well as other Devises must be governed by some Rules; that by the Civil Law, if a Man devised a Charity out of his Personal Estate, and Legacies thereout likewise to others, and the Personal Estate fell short to answer all, the Charity should be preferred; but in this Court that Rule will not hold, but the Charity must abate in Proportion to the rest; that since the Statute of Frauds, if a Man by his Will gave Lands to a Charity, yet if that Will was carried but imperfectly into Execution, and so was not good as a Will, it has been held not to be good as an Appointment: So was Dr. *Johnson*'s Case, where there were but two Witnesses to the Will; indeed, if a Man should make a Writing on Purpose to found a Charity, it might have another Construction; but when he makes a Will, and intends it to other Purposes, tho' he does thereby appoint a Charity; yet if the Will be defective as a Will, it shall not operate as an Appointment to support a Charity; that it was a long Time doubted, whether a Will in Writing, though good in all Circurmstances, should operate as an Appointment against the Issue in Tail; and if that was so much doubted, to support a Nuncupative Devise out of Lands to a Charity, would be carrying it still much farther; and

Mr. *Williams* mentioned a Caſe in *Swinb* 28, where a Man ſent for a *Scrivener* to make his Will, and directed him to give his Land to ſuch a one, and his Heirs, upon Condition. The Scrivener wrote the Deviſe; but before he had wrote the Condition, the Teſtator died, and this was adjudged a void Will; for an abſolute Deviſe it could not be, becauſe the Teſtator did not intend it ſo; and a conditional Deviſe, it could not be, becauſe the Condition was added after the Man's Death; that the Reaſon a Deviſe by Tenant in Tail to a Charitable Uſe ſhall be good againſt the Iſſue, is, becauſe the Teſtator had it in his Power by Fine to have barred the Iſſue; and tho' he did not live to perform that Ceremony, yet as a Will being perfect and compleat, by the Aid of the 43 *Eliz.* it might Work as an Appointment; for that at Common Law there were no Fines, nor Recoveries, nor Eſtates Tail, and therefore that Statute was a reſtoring of the Common Law; ſo a Deed of Bargain and Sale to Charitable Uſes, tho' not good by 27 *H.* 8. for want of Inrollment; yet by the other Act it will be good as an Appointment, for that reſtores the Common Law; but no Reſolution has ever gone ſo far as to ſupport a *Parol* Deviſe to a Charity out of Lands, becauſe being defective as a Will, which was the Manner of Conveyance, he intended to paſs it by, it can have no Effect as an Appointment, which he did not intend; and of this Opinion my Lord *Chancellor* ſeemed to be, but took Time to conſider of it, and afterwards decreed that it was not good as an Appointment.

DE

Termino S. Mich.

1714.

IN CURIA CANCELLARIÆ.

Case 268.

Sayer versus *Sayer*.

A Devise of all a Man's Personal Estate at such a Place, a Specifick Devise thereof, and not to be brought in to make up other Pecuniary Legacies.

A Man by his Will gives all his Personal Estate in *Wanstead*, except his Bed and Bedding, to *J. S.* and after devises 300 *l.* out of the Personal Estate, and his Houses in *Cannon-Street* to the Plaintiff, who now brings this Bill for a Discovery of Assets, and to charge the whole Personal Estate with the Payment of his Legacy; and it was proved in the Cause, that the Testator at his Death was possessed of a Coach and Horses at *Wanstead*, and that there were likewise some Arrears of Rent due to him at his Death, out of Lands in *Wanstead*: It appeared likewise, that the Testator had a Personal Estate besides that at *Wanstead*, to the Value of about 300 *l.* and besides the Houses in *Cannon-Street*.

The first Question was, Whether the Devise of his Personal Estate in *Wanstead* was not such a Specifick Devise thereof, as to exempt it from coming in Aid of the other Personal Estate towards Payment of this Legacy.

Another Queſtion was, Whether the Coach and Horſes, and the Arrears of Rent at *Wanſtead* paſſed likewiſe as part of the Specifick Legacy.

My Lord *Chancellor* decreed, that the Perſonal Eſtate at *Wanſtead* was not to be applied towards Payment of the 300 *l.* Legacy; firſt, becauſe it appeared that the Teſtator had a Perſonal Eſtate over and above that at *Wanſtead*, to the Value of about 300 *l.* and his Intent ſeems plain to charge that only with the Legacy, not having deviſed it out of all his Perſonal Eſtate whatſoever, or whereſoever, or incerted any Words, to ſhow, that his whole Perſonal Eſtate ſhould ſtand charged with it.

2*dly*, Becauſe having ſuch other Perſonal Eſtate to the Value of about 300 *l.* which he might preſume ſufficient to anſwer that Legacy; yet as a Supplement, and to aid the Deficiency of it, in Caſe that ſhould fall ſhort, he has likewiſe charged his Eſtate in *Cannon-Street* with it; which ſhows that he intended to provide for it out of ſome other Fund, and not out of his Perſonal Eſtate in *Wanſtead*, which he had before ſpecifically given to another; but the Caſe may ſo happen, that a Specifick Legacy ſhall be chargeable with the Payment of a Pecuniary Legacy; as in this Caſe, after he had deviſed his Perſonal Eſtate at *Wanſtead*, if he had likewiſe deviſed his Perſonal Eſtate at ſuch another Place, and then deviſed ſuch 300 *l.* Legacy, out of his Perſonal Eſtate, and died, leaving no other Perſonal Eſtate than in the two Places beforementioned, this 300 *l.* Legacy muſt have come out of his Perſonal Eſtate at large in both Places, tho' otherwiſe Pecuniary Legatees are generally to abate in Proportion, where the Perſonal Eſtate not ſpecifically deviſed, falls ſhort to anſwer their Legacies, and ſhall have no Aid of the Specifick Legatees to make up their Pecuniary Legacies; eſpecially, if they are deviſed generally, and at large, without ſaying, out of his Perſonal Eſtate, or out of all his Perſonal Eſtate

whatſoever,

whatsoever, or Words to that Effect; and it was agreed clearly, that this Devise of his Personal Estate at *Wanstead*, was as much a Specifick Legacy of it, as if he had enumerated the several Particulars of it.

It was likewise decreed, that the Coach and Horses were part of his Personal Estate at *Wanstead*, where he lived; for since there is no other Period for fixing the Time when a Devise shall take Place, but the Instant of the Testator's Death; and you cannot say, that what he had a Week, or a Fortnight, or any other Time before his Death, shall pass, rather than what he had at any other Time; therefore in Case of a Personal Estate, which is fluctuating and changing the Instant of his Death, is the only Time to ascertain it, and we have no other Rules in Equity for the Construction of Wills, than what are at Common Law; and here at his Death the Coach and Horses were at *Wanstead*; so for the Arrears of Rent, they are part of his Personal Estate at *Wanstead*, for they were issuing out of Lands there, and were there, and no where else; and for the Objection, that the Devise of his Personal Estate at *Wanstead* should carry only his Houshold Goods, because he thereout excepted his Bed and Bedding, which as urged, was an Argument of his Intent to pass only Things of the same Nature of those he had excepted, this was looked upon as an Objection of no Weight at the Bar, and the Court took no Manner of Notice of it.

Case 259. Sir *John Talbott* alias *Ivory* versus Duke of *Shrewsbury* & al'.

A Debtor, without taking Notice of the Debt, devises a Sum as great, or greater than the Debt to his Creditor, this shall be a Satisfaction, *secus*, if it were devised on a Contingency, or it were less than the Debt.

IN this Case it was said by Mr. *Vernon*, and agreed to by the Master of the *Rolls*, that if one, being indebted to another in a Sum of Money, does by his Will give him as great or greater Sum of Money than the Debt

Debt amounts to, without taking any Notice at all of the Debt, that this shall neverthelefs be in Satisfaction of the Debt, so as that he shall not have both the Debt and Legacy; but if such a Debt were given upon a Contingency, which if it should not happen, the Legacy would not take Place, in that Cafe, tho' the Contingency does actually happen, and the Legacy thereby became due, yet it shall not go in Satisfaction of the Debt, becaufe a Debt, which is certain, shall not be merged or loft, by an uncertain and contingent Recompence; for whatever is to be a Satisfaction of a Debt, ought to be fo in its Creation, and at the very Time it is given, which fuch contingent Provifion is not; and cited the Cafe of one *Pollexfen* to be fo adjudged by the Lord *Harcourt*, and affirmed on an Appeal in the Houfe of Lords; and as it is in the Cafe of a Will, fo it will be likewife if the Provifion were by a Deed; if the Provifion be abfolute and certain, it fhall go in Satisfaction of the Debt; but if it be uncertain and contingent, it can be no Satisfaction, becaufe it could not be fo in its Creation, and the happening of the Contingency afterwards, will not alter the Nature of it.

Another Point in this Cafe was, that Lands were devifed to Truftees in Truft, out of the Rents and Profits, to raife Money to pay Debts, and to fettle the Lands themfelves to feveral Ufes; but becaufe it appeared that the Rents and Profits of the Lands annually would not fatisfy the Debts in any reafonable Time, an Account was directed to be taken of the Teftator's Perfonal Eftate, and what that fell fhort to pay off the Debts, was to be made up by a Sale of part of the faid Eftate; and the Mafter of the *Rolls* faid, this was the common Courfe of Equity, where the Rents and Profits are not fufficient to pay the Debts in a reafonable Time; but if it had been directed to be raifed out of the Rents only, it would have been otherwife.

Note, *Pafch.* 2d *Georg.* Mr. *Vernon* cited a Cafe of *Shelton* and *Dormer* in my Lord *Somers*'s Time, where a

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like Decree was for a Sale of the Lands, for Payment of a Portion devised to be paid at a certain Time, out of the Rents and Profits of such Lands, it appearing, that the Annual Rents were not sufficient to raise the Portion by the Time; tho' in that Case the Land subject to the Portion was devised over to several others in Remainder, one after another; but if any Words in the Will show the Testator's Intent, that they should be raised out of the Annual Produce only, no Sale shall be decreed.

3

DE
Termino Paschæ,
1715.
In CURIA CANCELLARIÆ.

Tompkins versus *Tomkins*. Case 270.

THE Plaintiff's Father by his Will 1682, devised 500 *l.* apiece to the Plaintiff, his Daughter, and to two other Daughters, to be paid at their Respective Ages of 21 Years, or Days of Marriage, which should first happen, the said Portions to be raised out of the said Testator's Stock; and then devises the Rents of his Real Estate to his Wife for her Life, in Lieu and Satisfaction of her Dower, and for the Maintenance and Education of his Children; and also for and towards the raising and making up the said Portions, to his said Daughters; and then goes on; and after my Debts and Legacies paid and satisfy'd, I give and devise all my Land, Tenements, Hereditaments, to my Son, (one of the Defendants) and his Heirs, makes his Wife and the Defendant his Son Executors, and dies, leaving in Stock not above the Value of 100 *l.* The Wife enters, and the two other Daughters marrying, had their Portions paid them.

A. devises 500 *l.* apiece to his three Daughters, at their Ages of 21, or Marriage, to be paid out of his Stock, and devises the Rents of his Real Estate to his Wife, for Life, in lieu of Dower, and for the Maintenance of his Children, and towards making up their Portions; and after his Debts and Legacies paid, devises the Lands to his Son, who together with his Wife he made Executors. The Stock was but of 100 *l.* Value, the Wife being dead, and the two eldest Daughters having had their Portions paid them; held that the Lands were liable in the Hands of the Son to the youngest Daughter's Portion.

This

This Bill was now brought by the third Daughter, who had attained her Age of 21 Years, and was unmarried, to have her Portion; the Wife had been dead some Time, and the Defendant the Son and surviving Executor, insisted, that his Lands ought not to be charged with the raising of this Portion, in regard it was expresly directed to be raised out of the Stock and Rents of the Estate during the Wife's Life; and that if the Wife had exhausted or consumed the Surplus of the Rents, which should have raised the Plaintiff's Portion, she ought to fall on her Assets; or however, that the Plaintiff could not lay the Load on his Estate, if the Wife left no Assets.

But the Court was of Opinion, that in this Case the Defendant's Estate was chargeable to make up the Portion to the Plaintiff; for the several Gradations in his Will show, that the Portions were in all Events to be made good to his Daughters; and therefore he first charges them on his Stock, and after devises them to be made out of the Surplus of his Rents, during his Wife's Life; and lastly, gives the Lands to his Son subject thereto, by devising them to him after his Debts and Legacies paid, which in a Will amounts to a Charge on his Lands for the Payment thereof; since the Son by the Will is not to have the Lands till after the Debts and Legacies are paid.

And therefore it was decreed, that an Account should be taken of the Stock, and what the Proportion thereof (after a proportionable Deduction for the other two Legacies) fell short, should be made up out of the like proportionable Surplus of the Rents, during the Wife's Life, and what they fell short to be supplied out of the Defendant's Estate.

But it was not determined with any clearness, whether, if the proportionable Part of the Stock, and of the Surplus of the Rents, which were appointed the Fund, in the first Place, for the Payment of these Legacies were wasted by the Wife, Whether the Loss

3 thereof

thereof, as to the Plaintiff's Legacy remaining unpaid, ſhould fall on the Plaintiff herſelf; or if ſhe ſhould, by Reaſon of ſuch waſting, load the Real Eſtate, ſo much the heavier to make good her Legacy; tho' my Lord *Chancellor* ſeemed to incline, that her Legacy muſt, as this Caſe was, be made good to her in all Events out of the Real Eſtate, in Caſe the other Funds provided for it proved Deficient, or were waſted, at leaſt ſo much thereof as by any Miſapplication during her Minority was loſt and gone of the other Funds; tho' he ſaid, from the Time of her attaining her full Age, it might, perhaps, deſerve another Conſideration.

Another Point in this Caſe was, that the Defendant the Son, had mortgaged this Eſtate to ſome other of the Defendants, who had full Notice of the Will, as was proved in the Cauſe; and whether they ſhould be affected with this Legacy was the Queſtion, tho' there was little ſaid in Defence of this Point; but that the Defendants were only Executors of the Mortgagee, and knew nothing of the Tranſactions in taking the Mortgage.

Mr. *Vernon* argued, that in Caſe there could be any Doubt made of it, as he thought there could not; yet that the Defendant, the Son, who received the Money, would be chargeable therewith; and that the Plaintiff might in the Nature of a *Ceſtui que Truſt*, proſecute him as a Truſtee, for Recompence thereout, 'till her Legacy paid, and cited the Caſe of *Cherry* and *Ferrers* in this Court to have been decreed accordingly.

But my Lord *Chancellor* ſeemed to turn this reaſoning upon him, that there the Wife for the proportionable Part of the Surplus was but in the Nature of a Truſtee, and the Plaintiff muſt expect her Recompence for what ſhe had waſted out of her Aſſets, and not load the Son therewith; but it was decreed to an Account as before is mentioned.

Case 271.

Linguen versus *Souray*.

By Marriage Articles 700 *l.* being the Wife's Portion, together with 700 *l.* to be added to it by the Husband, was agreed to be laid out in Purchase of Lands to be settled in strict Settlement, with Remainder in the usual Form to the Heirs of the Husband; before any Purchase made, the Husband dies without Issue, having first devised his Personal Estate, which was of greater Value than the 1400 *l.* but without taking Notice of it to his Wife, and his Real Estate to his two Nephews, one of whom was his Heir at Law. This Money shall in a Court of Equity be looked upon as Land, and the Devise to the Wife, which was of greater Value, as a Satisfaction thereof.

ON a Treaty of Marriage, Articles were entred into, whereby the Sum of 700 *l.* being the Wife's Portion, and 700 *l.* more added to it on the Part of the Husband, in all 1400 *l.* was agreed to be laid out in the Purchase of Lands, to be settled on the Husband for Life, Remainder to the Wife for Life, Remainder to Trustees to support, *&c.* Remainder to the first and other Sons of that Marriage in Tail Male successively, Remainder to the Issue Female of that Marriage, Remainder to the Right Heirs of the Husband: The Marriage takes Effect, the Husband dies without Issue, and before any Purchase, pursuant to the Articles, having first made his Will, and thereby he devises all his Personal Estate to the Defendant, who was his Wife, and devises all his Real Estate to the Plaintiffs, who were his Nephews, and one of them his Heir at Law; makes his Wife Executrix, and takes no Manner of Notice of the 1400 *l.*

And now this Bill was brought by the Plaintiffs to have this 1400 *l.* as they would have the Land, if the Purchase had been made pursuant to the Articles; it appeared in the Cause, that at the least Computation that could be made, the Wife had above 77 *l. per Ann.* by the Devise to her of the Personal Estate, which was 7 *l. per Ann.* more than she would be intitled to, in Case the Purchase had been made; and therefore it was decreed the 1400 *l.* was bound by the Articles, and should go to the Plaintiffs as the Land would have done, if a Purchase had been made pursuant to the Articles, and was in a Court of Equity to be looked upon as a Real Estate, and well devised to the Plaintiffs by this Will; and tho' the Wife could not be shut out of the Provision in-

tended her by the Articles for Life, if ſhe thought fit to abide by the Articles; yet the Deviſe to her of the Perſonal Eſtate being more than an Equivalent, if ſhe choſe to take by the Will, it muſt in a Court of Equity be taken as a Satisfaction of the Articles as to her, and no Manner of Hardſhip to her; and it was ſaid, that as this Caſe is, that if a Purchaſe had been made, even after the making this Will, though at Law ſuch Lands would not paſs; yet in this Court there could be no Queſtion but the Plaintiffs would have the Benefit thereof, by the Relation to the Articles; and my Lord *Chancellor* was clear of the ſame Opinion; and it was ſaid to have been ſeveral Times held in this Court, that if a Man by his Will gives ſeveral Specifick Legacies, and deviſes the Reſidue of his Eſtate to another, and his Circumſtances vary, ſo that the Reſiduary Part becomes very inconſiderable; yet the Reſiduary Legatee muſt content himſelf with it, and ſhall have no Aſſiſtance from the Specifick Legatees; no more ſhall the Wife in this Caſe, when the Plaintiffs come to carry the Articles into Execution, which will take away ſo much of the Perſonal Eſtate; and this being ſo decreed by my Lord Chancellor *Harcourt*, was now on a Rehearing affirmed by my Lord Chancellor *Cowper*.

Roach verſus *Hammond*.

Caſe 272.

A Man deviſes his Perſonal Eſtate to the Uſe of his Relations, without ſpecifying any in Particular, it ſhall be diſtributed according to the Statute of Diſtributions.

A Man by his Will in 1704, deviſes all his Real and Perſonal Eſtate to the Defendant, *for the Uſe of his Relations*, without ſpecifying any in Particular, or uſing any other Words, makes the Defendant his Executor, and in 1706 died; and now the Plaintiffs, who were the Mother and three Siſters of the Teſtator, brought this Bill, as neareſt Relations, for a Diſcovery and Account of the Perſonal Eſtate, and the Plaintiffs to come in according to the Courſe of Diſtributions ſettled by 1 *Jac.* 2 *Car.* 17.

And

And it was agreed to be the Rule of this Court in the Construction of such Devises to Relations; that those, who by the Statute of Distributions would be intitled to the Personal Estate in Case he had died Intestate, should upon such general Devises be let in to the same Proportions only; and my Lord *Chancellor* said, he thought it the best Measure for setting bounds to such general Words; and that it had been often ruled accordingly in this Court.

Case 273.

Bawdes versus *Amhurst*.

On a Marriage Treaty, the intended Husband and the young Lady's Father went to a Councellor's Chambers, to have in Consideration of the Portion the Father proposed to give, a Settlement drawn; Minutes of the Agreement were taken down in Writing by the Council, and given by him to his Clerk to be drawn up in Form: The next Day the Father dies, and the Day following the Marriage was Solemnized. This Agreement, notwithstanding these Preparations, held to be within the Statute of *Frauds* and *Perjuries*.

ON the Plaintiff's Application in Way of Marriage to his new Wife the Defendant's Sister, her Father proposed to give her Portion of 4500 *l.* and the Plaintiff proposed to settle on her by way of Jointure, a Rent Charge of 450 *l. per Ann.* and in Order thereunto, the Plaintiff and the young Lady's Father went to Mr. *Minshull*'s Chambers in the *Temple*, who was to draw the Settlement, as Council for the Lady, and Mr. *Minshull* hearing the Proposals on both Sides, took down Minutes or Heads thereof in Writing; and the same Day gave them to his Clerk to draw Articles according to the Substance thereof: The next Day, the young Lady's Father was taken ill suddenly, and died in about two Hours after: The next Morning the Plaintiffs intermarried, and now brought this Bill to compel a Specifick Execution of the Marriage Agreement, and to have the Portion paid. The Defendant pleaded the Statute of *Frauds* and *Perjuries*, and on arguing that Plea, the Benefit thereof was saved to the Hearing.

It was now argued by Mr. *Cooper* and Mr. *Vernon* for the Plaintiffs, that this was such an Agreement, as a Court of Equity might well carry into Execution, that the Statute did not require all Agreements to be signed by the Parties themselves; but if they were signed by

any one lawfully authorized thereto, it was sufficient; that here Mr. *Minshull* had Authority and Directions from both Parties to draw the Articles; that he took down these Minutes or Heads from the Parties own Mouth, and reduced them into Writing; and that therefore this could not be looked upon as a Parol Agreement, or any Danger of Perjury, since there was a Writing of it, nor could there be any variety of Evidence concerning it; for the same Reason, that in the Case of *Mascall* and *Cooke* in this Court, where only a Draught of a Marriage Settlement was prepared, and before it was ingrossed the Parties intermarried, and the Father was present, and gave the Wedding Dinner; he was afterwards decreed to pay the Marriage Portion, tho' the Agreement was never signed by either Party; that in several Cases, tho' there be nothing of the Agreement reduced into Writing; yet it has been decreed to an Execution in this Court; as if a Man, by his Answer confesses the Agreement as charged in the Bill, he cannot avoid it, by insisting it was never reduced into Writing, because, when he himself confesses it, there can be no Danger of Perjury or Contrariety of Evidence, no more can there be in this Case, when there is a Writing or Memorandum of the Substance.

But it was argued on the other Side, and decreed to be no such Agreement as this Court could carry into Execution; and my Lord *Chancellor* said, he had been always tender in laying open that wise and just Provision the Parliament had made; that the Act had not only directed such Agreements to be in Writing, as if that alone were sufficient, but went further, and directed them to be signed by the Parties themselves, or some other lawfully authorized by them for that Purpose; that to obviate the Pretence of such and such Cases, being out of the Mischief of the Statute, the Parliament had in general Words comprehended all, and directed that all Agreements should be in Writing, and signed by the Party; that he knew no Case, where an

Agreement, tho' it were all written with the Party's own Hand, had been held ſufficient, unleſs it had been likewiſe ſigned by the Party, and ſaid, that the Party's not ſigning of it, was an Evidence that he did not think it compleat; that he had left it to an after Conſideration, and might afterwards make Alterations or Additions in it; and therefore, unleſs it were either ſigned by him, or ſomething Equivalent done, to ſhow that he looked upon it as compleated and perfected; he thought ſuch Writing by the Party himſelf was not ſufficient to bind him within that Statute, and cited the Caſe of *Mullet* and *Halfpenny*, where the Defendant on a Treaty of Marriage for his Daughter with the Plaintiff, ſigned a Writing, compriſing the Terms of the Agreement; and afterwards deſigning to elude the Force thereof, and get looſe from his Agreement, order'd his Daughter to put on a good Humour, and get the Plaintiff to deliver up that Writing, and then to marry him, which ſhe accordly did, and the Defendant ſtood at the Corner of a Street, to ſee them go by to be married, and afterwards forced the Plaintiff to bring his Bill in this Court to be relieved; and my Lord *Chancellor* ſaid, he remembred very well, that this Cauſe was heard before the Maſter of the *Rolls*, and the Plaintiff had a Decree; but he ſaid, this was on the Point of Fraud, which was proved in the Cauſe, and *Halfpenny* walked backwards and forwards in the Court, and bid the Maſter of the *Rolls* obſerve the Statute, which he humorouſly ſaid, *I do, I do.* And in the principal Caſe it was decreed to be no Agreement, which this Court could carry into Execution, being only Preparatory Heads, which were afterwards to be drawn into Form, and might then receive ſeveral Alterations or Additions, or the Agreement entirely broke off upon ſome further Enquiry, or Information of the Parties Circumſtances.

But *Note*, It ſeemed to be agreed, both by the Court and Council, that if the Marriage had been had upon the foot of this Writing, and the Father had been privy,

and conſenting to it, that he ſhould afterwards have been obliged to execute his Part thereof.

Beal verſus *Beal*.

Caſe 274.

Portions what Intereſt to carry, and from what Time.

THIS was a Rehearing, and the Caſe appeared to be ſhortly this, the Plaintiff's Father being Tenant for Life, with Remainder to his Brother in Tail, prevails on his Brother to join with him in a Common Recovery, whereby the Eſtate was ſettled to the Uſe of the Plaintiff's Father for Life, Remainder to Truſtees during his Life to ſupport Contingent Remainders, Remainder to ſuch Woman as he ſhould afterwards happen to marry, for Life, for her Jointure, Remainder to the firſt, and other Sons of the Plaintiff's Father in Tail Male ſucceſſively, Remainder to the Brother in Tail, Remainder to the Right Heirs of Plaintiff's Father; and in the Deed declaring the Uſes of the Recovery was a *Proviſo*, that it ſhould be lawful for the Plaintiff's Father by Writing, or laſt Will, to charge the Eſtate with any Sum or Sums of Money, not exceeding 2000 *l.* for the Portions of Daughters or younger Sons, to be paid at ſuch Times, and by ſuch Proportions as the Father ſhould direct: The Father afterwards marries the Defendant, and by her had Iſſue only two Daughters the now Plaintiffs, and by his Will taking Notice of his Power, appoints the Sum of 2000 *l.* to be raiſed out of the ſaid Eſtate, for his ſaid two Daughters, and to be paid and payable to them at their reſpective Ages of 18 Years, or Days of Marriage, which ſhould firſt happen; without ſaying, after the Death of his Wife, or any *Proviſo*, that it ſhould not effect the Wife's Jointure, and then the Father dies.

And now this Bill was brought by the two Daughters, who were under 18, and unmarried, to have Intereſt for their Portions, 'till payable. My Lord Chancellor *Harcourt* decreed, that they ſhould have Intereſt after the Rate of 3 *per Cent. per Ann.* for their Portions 'till 12

Years

Years of Age, and from thence, 'till payable 4 *l. per Cent.* but they not liking this Decree, brought on the Cauſe again, and preſſed very much for an Allowance of 6 *l. per Cent.* for their Portions, 'till payable.

But my Lord *Cooper* ſaid, he thought the former Decree very tender in the Proviſion thereby made; and that it was rather a Recommendation to the Mother to make them that Allowance, than a Decree to charge her Jointure therewith; but ſince they were not ſatisfied with that Decree, as appeared by their bringing the Cauſe to a Rehearing, he muſt now give them no more than what in ſtrict Juſtice they could demand; and that ſince their Portions were not payable 'till 18, or Marriage, he could not charge the Jointreſs with Intereſt thereof in the mean Time; but ſaid, that the Reaſon of Poſtponing the Payment thereof 'till that Time, being in favour of the Jointreſs, ſhe ought to Maintain them out of the Profits of her Jointure Lands; but in regard the ſaid Portions could not in Strictneſs carry Intereſt, 'till they became payable, it was decreed, that from the Time they became payable, they ſhould be allowed 6 *l. per Cent.* Intereſt for the ſame, and whether the Portions on the Daughters attaining the Age of 18 Years, or Marriage, ſhould be immediately raiſed, ſo as to charge and effect the Jointure Eſtate for Life, or wait 'till her Death? My Lord ſaid, it would be Time enough to conſider of that, when that came to be the Caſe.

DE
Term. S. Trinitatis,
1715.
In Curia Cancellariæ.

Challis versus *Casborn*.

Case 275.

A Mortgagor who borrows more Money from the Mortgagee on his Bond, shall redeem without paying the Bond Debt; but his Heir cannot, neither can the Devisee of the Equity of Redemption since the Statute against fraudulent Devises.

IN this Case it was said by Mr. *Vernon*, and agreed to by the Court, that if a Man has a Debt owing to him by Mortgage, and another on Bond from the same Person, that he cannot tack them together against the Mortgagor; but that he shall be let into a Redemption on Payment of the Mortgage Money only; but the Heir in such Case shall not be let into a Redemption without Payment of both, because the Land in his Hands is chargeable with the Bond, even at Law; and now since the Statute against fraudulent Devises, the Devisee of the Equity of Redemption is in the same Case, and cannot Redeem without Payment of both, because the Statute makes such Devise void, as against Creditors, and then the Devisee stands in the same Place as the Heir must have done, if no Devise had been made; but before that Statute, such Devisee would not be liable to the Bond Debt, any more than the Mortgagor himself.

Another Point in this Case was, that a Man seised of some Freehold Estate, and also of a Copyhold Estate, devised all his Real and Personal Estate for the Payment

of his Debts, and died without any surrender of the Copyhold Estate to the Use of his Will; and whether this Court would supply the Want of such Surrender, as they would have done if the Copyhold Estate had been expressly mentioned in the Will, as Copyhold? Mr. *Williams* said, the Master of the *Rolls* had supplied the Defect of a Surrender in such a Case, where there was no Freehold at all; and he thought it the same Case here, where the Freehold Estate was not sufficient for Payment of the Debts.

But my Lord *Chancellor* said, he had never known it carried so far, because he thought the Devise of his Real Estate did not show an Intention to pass a Copyhold, which in the Eye of the Law was of the lowest Regard, and looked upon only an Estate at Will, though Custom had now fixed it in the Copyholder; and said, unless they could show some Precedents, he could not assist them.

A third Point was, that the Devisees of the Real and Personal Estate were made Executors; and therefore Mr. *Vernon* said, it was a settled Distinction in this Court, that they ought to apply the Estate in such Case, in a Course of Administration; because, if the Estate were sold, it would be Personal Assets in their Hands, and then to pay a Debt of an inferior Nature, before one of a Superior, would be a Devastavit; but if they had not been made Executors, then the Creditors should have come in all equally; because in Equity all Debts are equal, and they as Trustees could give no Preference, and would be in no Danger, as Executors in such Case.

But my Lord *Chancellor* thought the Accident of their being made Executors, ought to make no Difference in Equity; but that all Creditors should be considered equally, and would see Precedents, though Mr. *Vernon* said, it had been a settled Distinction, and several Precedents in Point.

Read verſus *Duck.*

Caſe 276.

IN this Caſe a Queſtion aroſe upon a Freeman of *London*'s Will, upon what Part of the Teſtator's Eſtate the Loſs, which was occaſioned by the Failure of the Executors, ſhould fall, and it was referred to a Maſter to ſtate a Caſe to be ſent to the Recorder of the City, to certify it to the Court, and the Caſe as Stated was thus:

If a Loſs happens to a Freeman of London's Eſtate, by the Inſolvency of his Executors, ſuch Loſs ſhall be born out of the Teſtamentary Part of his Eſtate only, and not out of the whole Perſonal Eſtate.

Whether by the Cuſtom of the City of *London* the Loſs which befals a Freeman's Eſtate, by the Inſolvency of his Executors, ought to be born out of the Teſtamentary Part of his Eſtate only, or out of the whole Perſonal Eſtate, as well Cuſtomary as Teſtamentary? To which it was certified:

We the Lord Mayor and Aldermen of the City of London, *whoſe Names are under-written, in Obedience to the ſaid Order, by* William Thompſon, *Eſq; Recorder of the ſaid City, humbly certify unto your Lordſhip, that if a Freeman of* London *dies, leaving a Widow and Children, his Perſonal Eſtate after his Debts paid, and the cuſtomary Allowance for his Funeral, and the Widow's Chamber being firſt deducted thereout, is by the Cuſtom of the ſaid City, to be divided into three equal Parts, and diſpoſed of as follows,* viz. *one Third Part belongs to the Widow, another Third Part to the Children unadvanced by him in his Life Time; and the other Third Part ſuch Freeman may diſpoſe of by his Will, as he pleaſes; but where a Loſs of the Freeman's Eſtate by the Inſolvency of his Executors happens, there is not any Cuſtom of the City of* London *which directs, whether ſuch Loſs ought to be born out of the Teſtamentary Part of his Eſtate only, or out of his Perſonal Eſtate, as well Cuſtomary as Teſtamentary.*

This

This Report of the Lord Mayor and Aldermen being returned back to the Lord Chancellor *Cowper*, the Matter was again debated by Council before his Lordſhip, who was of Opinion, that the Widow and Orphans of a Freeman of *London* are in the Nature of Creditors, and ſhall have two Parts in three of the Perſonal Eſtate he ſhall die poſſeſſed of; and that if any Loſs happen by the Inſolvency of his Executors, ſuch Loſs ought to be born by the Legatees of a Freeman, intirely out of his Teſtamentary Part, and the ſame was in this Caſe decreed accordingly; ſo that the Widow and Orphans had two full Thirds of the Freeman's Eſtate, as if no ſuch Loſs had been.

DE
Termino S. Mich.
1715.
In Curia Cancellariæ.

Casey versus *Beachfield.*

Case 277.

A Plaintiff in a Cause cannot be made a Witness; but a Defendant may, because he is forced into the Suit.

IN this Case it was said by Mr. *Vernon*, that the Reason you cannot examine any of the Plaintiffs, as Witnesses in the Cause, is, because, if the Cause Miscarries, the Plaintiffs will be liable to Costs; and therefore their swearing is to exempt themselves, and 'tis their own Choice that they are made Plaintiffs, for without their Consent they could not be made so; but Defendants are forced into the Cause, and if their being made Parties should absolutely invalidate their Testimony, it would be in the Power of any one, who had a Mind to oppress another, to deprive him of his Defence, by making the most material Witnesses Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witnesses, saving just Exceptions to their Credit, &c.

Case 278.

Packer versus *Wyndham.*

Where the Wife's Fortune, tho' the Husband made no Settlement on her, shall go to the Creditors and Representatives of the Husband and not to the Representatives of the Wife.

THE only Question in this Case was, Whether any, and what Part of the Wife's Fortune should be subject to answer the Plaintiff's Demands, who were Sisters and Heirs at Law; and also Administrators and Creditors of the Husband against the Defendant, who was Administrator of the Wife, who survived her Husband: As to which, the Case was thus, Mrs. *Anne Ash* being intitled to the Sum of 5500 *l.* secured to her by a Mortgage for Years on the Estate of Sir *Edmond Bacon*, taken in the Name of Trustees; and likewise to 3000 *l.* secured to her by a Mortgage for Years on the Estate of Sir *Humphry Briggs*, taken in her own Name; and also to a Bond Debt of 400 *l.* and to several Jewels and other Things of considerable Value. The said Mrs. *Ash* became a Lunatick, and on a Commission of Lunacy issued out for that Purpose, the Custody of her Person and Estate was committed to one of the Defendants: Some Time after, *Philip Packer*, Esq; the Plaintiff's Brother, by some Contrivance got the Lunatick, and married her, without making any Settlement or Provision for her; and for this Contempt he and others concerned in procuring the Marriage, were committed by this Court to the *Fleet*, (but on a Suit in the Spiritual Court, the Marriage was sentenced to be good; and that Sentence afterwards affirmed on an Appeal to the Delegates) and it was order'd at the same Time, that all the Deeds and Securities relating to the Lunatick's Fortune, and also the Jewels, should be brought and lodged with one of the Masters of this Court, in Order to secure some Provision for the Wife, in Case she should survive her Husband; and likewise for the Children of that Marriage, in Case there should be any.

Some Time after, on Mr. *Packer*'s Application to the Court by Petition to have the Commission of Lunacy superseded; but in regard, Mr. *Packer*'s Estate was much

incumbred, and he had made no Settlement on his Wife; it was at the ſame Time ordered, that ſo much of the 5500 *l.* as was neceſſary, ſhould be applied towards diſcumbring his Eſtate, and the Reſidue to be laid out in a Purchaſe of Lands, which together with ſo much of Mr. *Packer*'s Eſtate as would made up 500 *l. per Ann.* was to be ſettled on Mr. *Packer* for Life, with Remainder to his Wife for Life, for her Jointure, Remainder to the Iſſue of that Marriage, &c. with Remainder to Mr. *Packer*'s right Heirs; and upon Mr. *Packer*'s making ſuch Settlement, the Reſidue of his Ladies Fortune was to be paid and delivered to him; and in the mean Time he was to be examined in Interrogatories touching Incumbrances on his Eſtate.

Mr. *Packer* never complied with any Part of this Order; but being indebted to one *Gooding* in a conſiderable Sum of Money, *Gooding* brings his Action againſt him, and recovers Judgment, and took out a *Fi. Fa.* and thereupon the Mortgage Term of Sir *Humphry Briggs* was ſold by the Sheriff, and the Debt paid.

After this, Mr. *Packer* being indebted to the Plaintiffs, his Siſters, in about 2000 *l.* apiece given them for their Portions, does by Indenture, taking Notice thereof, aſſign the ſaid 5500 *l.* and all Securities taken for the ſame; and alſo all other the Fortune and Portion belonging to him in Right of his Wife, to Truſtees in Truſt, in the firſt Place to pay thereout to the Plaintiffs their Portions, and after in Truſt for himſelf, his Executors and Adminiſtrators.

Some Time after Sir *Edmond Bacon* paid in the 5000 *l.* due on his Mortgage; and Mr. *Packer* not having complied with the Terms of the laſt Order, that ſame was again placed out at Intereſt on a Security taken, in the Name of a Senior Maſter of this Court, after which Mr. *Packer* died Inteſtate, and without Iſſue; and about two Years after, Mrs. *Packer* died likewiſe Inteſtate, and without Iſſue; whereupon the Plaintiffs, who were Siſters and Heirs at Law to Mr. *Packer*, and alſo Creditors as above-

above-mentioned, took out Letters of Adminiſtration to him, and the Defendant *Wyndham* took out Letters of Adminiſtration to Mrs. *Packer* the Wife, and brought a Croſs Bill to have the Fortune and Securities delivered over to him.

For the Plaintiffs in the original Cauſe it was argued, that they had an undoubted Right to this Fortune of the Wife's, not only as they were Creditors, but alſo as they were Repreſentatives and Heirs at Law to the Huſband; that if the Settlement had been made purſuant to the Order, the laſt Limitation being to the right Heirs of Mr. *Packer*, would have carried the Lands to them; that tho' no Settlement were made, yet as Repreſentatives to Mr. *Packer*, they were intitled to it; ſo that call it Land, or call it Money, yet it equally belongs to the Plaintiffs; that a *Choſe* in Action belonging to the Wife may be releaſed by the Husband; and if Truſtees for the Wife's Fortune ſhould pay it to the Huſband, his Wife would be without any Remedy; that a Wife on her Marriage is to forſake Father and Mother, and cleave to her Husband, and ſurely her Fortune is to go along with her; that a Husband may maintain Trover for his Wife's Goods taken from her before Marriage, without joining her in the Action, ſo is 2 *Lev.* 107; and if a Husband before Marriage agrees to make a Settlement on his Wife, and afterwards makes the Settlement accordingly, this intitles him to all her Fortune, eſpecially if it were made in Conſideration of that Fortune; and therefore his Repreſentatives ſhall go away with it, tho' the Wife ſhould ſurvive, and this has been ſeveral Times ſettled in this Court; and here, tho' no actual Settlement has been made, yet the Wife has had the Benefit of her Fortune preſerved to her for Life, which is all ſhe ſhould have had, in Caſe the Settlement had been made; that ſhe being dead, and no Children to be provided for, her Fortune ought to go over to her Huſband's Family, and not return to her own; that tho' *Choſes* in Action are not aſſignable at Law, yet ſuch

2 Aſſign-

Aſſignments are ſupported every Day in this Court, and the Plaintiffs in this Caſe are Creditors; and therefore more ſtrongly intitled to the Benefit of the Husband's Aſſignment; that theſe Securities being lodged in the Court, makes no Manner of Difference, for the Court is but in the Nature of a Truſtee of them for the Wife, and has no Property therein; but the Property is ſtill in the Wife, and conſequently in the Husband; that any Diſpoſition by *Ceſtui que Truſt*, is binding upon the Truſtee in a Court of Equity, and even at Law; if the Huſband brings Debt on the Wife's Bond, and recovers Judgment, this alters the Nature of the Security, and makes it the Husband's; and ſo it has been lately adjudged in the *King*'s-*Bench*, where ſuch a Judgment was held aſſignable within the Statutes of Bankrupts for the Benefit of the Husband's Creditors, for when the Husband recovers Judgment, the Debt is turned into *rem adjudicatum*, and is no longer a *Choſe* in Action.

But my Lord *Chancellor* ſeemed to think, that ſuch Judgment would not have carried it to the Husband's Repreſentatives againſt the Wife ſurviving, if that had been the Point of the Caſe.

It was likewiſe urged, that the Order of the 19th of *March* had not at all varied the Caſe, for the Intent thereof was only to ſecure ſome Proviſion for the Wife; that ſhe being now dead, that Order has had its Effect, and the Plaintiffs who ſtand in the Husband's Place ought to have the Reſidue of the Wife's Fortune.

On the other Side it was argued, that by this Commiſſion of Lunacy againſt the Wife, the Property of her Fortune was veſted in the Crown, and this being in Force at the Time of the Marriage, prevented the Husband's Power over it; that he had indeed been very juſtly committed for his Contempt in marrying her; but that would be a very inſignificant Puniſhment, if he might at the ſame Time go away with all her Fortune; that at leaſt the Crown had a Power to preſerve the Eſtates and Fortunes of Lunaticks, againſt any Diſpoſi-

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tion of their own; and that Power was lodged in this Court, that the Court had more than a bare Custody of this Lady's Fortune; that by the Order of the 19th of *March*, Mr. *Packer* was not to have any Part of her Fortune, 'till he made the Settlement, thereby ordered; that this was in the Nature of a Condition precedent; and he not having performed his Part thereof, had no Title to the Fortune; that the Husband's Assignment could not be pretended to affect the 3000 *l.* on Sir *Humphry Brigg*'s Mortgage, the Sheriff having made an absolute Sale of the legal Term on the *Fi. Fa.* before that Assignment, and the Vendee by that Sale was become the absolute Owner thereof; and Mr. *Vernon* cited a Case of *Burnet* and *Kinaston*, where the Wife having a Sum of 1400 *l.* out upon Mortgage, the Husband after Marriage made an Assignment of this Money, and agreed, that when it was paid in, the Trustees should invest it in the Purchase of Lands, to be settled to several Uses; then the Husband died, and afterwards the Wife died before the Money was paid in, and it was decreed for the Representatives of the Wife, against the Representatives of the Husband; the Reason of which Case he said was, that the Husband could Transfer no more to another, than he himself had; that he had but a Power of calling in this Money, and if he had made Use of that Power and received it, the Property had been absolutely in him; that his Assignee, who stood in his Place, could have no other Interest than the Husband himself had; and since the Assignee did not reduce it into Possession during the Husband's Life, the Wife being the Survivor, became intitled to it as a *Chose* in Action, and consequently it must go to her Representatives, and this he said was a Case in Point.

It was likewise urged, that if this Fortune should go to the Representatives of the Husband, it might have proved a very great hardship on Mrs. *Packer*, for she might have married again, and had Children, and they must have been left destitute of any Provision; that as to the

Husband's Assignment it was general; and if such general Assignments should prevail, it would soon put an End to the Doctrine of Chattels Real, and *Choses* in Action surviving to the Wife; for then it would be only for the Husband immediately after Marriage, to make a general Assignment of all his Wife's Fortune; and that would prevent their taking any Thing after his Death, tho' nothing more were done by the Husband to alter the Property; that as the Plaintiffs could with no Colour ask the Decree they are now seeking for against the Wife herself, if she were living, no more ought they to prevail against the Defendant, who is her Representative, and stands in her Place; and Mr. *Vernon* cited a Case of *Pheasant* and *Pheasant*, where a Man married a City Orphan without the Leave of the Court of Orphans, and for this he was committed and fined; and sometimes that Court has fin'd a Man in such Case, to the full Value of the Wife's Fortune; yet that Court is of much inferior Jurisdiction to this; and though such Proceedings may perhaps be somewhat Arbitrary, yet they have never been condemned or prohibited; and therefore he submitted it to the Court, Whether Mr. *Packer*'s marrying his Lady, who was then under the Care and Protection of this Court, without their Leave, was not such a Contempt as might amount to a Forfeiture of her Fortune.

And it was urged by most of the Council for the Defandants, that the Power of the Crown over Lunaticks was such a Prerogative, as vested their Fortunes in the Crown, tho' the Committee was accountable for the Profits to the Relations of the Lunatick, or to the Lunatick himself, if he recovered; and if so, the Possession of the Wife was divested before her Marriage, and consequently the Husband had no Power to dispose of her Fortune; but this was thought by several to be no Law, and the Court seemed to think it of so little Weight, that no Answer was offered to it.

Lord

Lord *Chancellor.* As to the Marriage, that is now out of the Caſe, having had its Agitation in a proper Court, and a Sentence pronounced for it; and therefore it is to be looked upon as Valid and good. As to the Order 19th of *March*, I think that is likewiſe out of the Caſe, for as the Huſband, if he had complied with the Terms of that Order, had been a Purchaſor of his Wife's Fortune, ſo he having not complied with them, it is now as if no ſuch Order had been made; ſo on the other Hand, the Wife being now Dead, and no Children left, the Reaſon for this Court's interpoſing is at an End; and then, as to the 5500 *l.* that being paid in during the Coverture, was the Huſband's Money, and the Property abſolutely veſted in him by Law; and though this Court thought fit to lay their Hands on it, and had Power ſo to do, being paid into the Maſter's Hands; yet that was only in the Nature of a Caution, 'till the Husband ſhould make ſome Proviſion for his Wife; it was the Husband's Money, but the Court had a Power to detain or keep it from him 'till he made ſuch Proviſion; but the Wife being now dead, and no Children to be provided for, the Reaſon of their keeping the Money from him is at an End; and then, *Equitas ſequitur Legem*, and muſt give it to the Husband's Repreſentatives, to whom by Law it belongs. As to the 3000 *l.* on Sir *Humphry Brigg*'s Mortgage, that being ſold by the Sheriff on a *Fi. Fa.* before the Huſband's Aſſignment, muſt take Place againſt the Aſſignment, tho' perhaps the Plaintiffs may have an Equity to the Remainder, after Payment of *Gooding*'s Debt; for the Husband may aſſign over a Term or Mortgage for Years, which he has in Right of his Wife, and ſo he may likewiſe the Truſt of ſuch Term, and this ſhall prevail againſt the Wife, though ſhe ſurvives; and this will be different from the Caſe of *Burnet* and *Kinaſton*, for in that Caſe the Mortgage to the Wife was a Mortgage in Fee, which the Husband alone could not diſpoſe of; and therefore the Eſtate being ſtill in the Wife, carried the Money along with it to her and her Repreſentatives,

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but of a Term for Years, or the Truſt of ſuch a Term, the Husband has the abſolute Power, and may diſpoſe of it without his Wife's joining with him; and therefore this Aſſignment of his to the Plaintiffs might have been good, if it had not been for the antecedent Sale by the Sheriff; but, however, this Queſtion is not now before me, and 'till you bring on the Cauſe againſt *Gooding*'s Creditors, I ſhall ſay nothing further in it.

As to the Bond of 400 *l.* that I think was plainly a *Choſe* in Action, and muſt go to the Defendants, notwithſtanding the Husband's Aſſignment, becauſe it was a Thing not aſſignable at Law, and here ſeems no Equity to ſupport it againſt the Defendants; but as to the Jewels they muſt go to the Plaintiffs, for this Court kept them but as a Pledge or Caution, and the Property was ſtill in the Wife, and conſequently in the Husband, and here was no tort or tortious Act to diveſt that Property, and turn it into a *Choſe* in Action, for the Poſſeſſion of the Court was not ſuch; and therefore the Plaintiffs, as Repreſentatives of the Husband, have a Right to them likewiſe; and he ſaid, the Difference between a Bond or ſuch like, and a Term for Years, whereto the Husband was intitled in Right of his Wife, was that, tho' the Bond, *&c.* was meerly a *Choſe* in Action, and not aſſignable by Law; but a Term for Years was only a Chattel Real, which the Huſband might aſſign by Law without his Wife, and ſo he might, the Truſt of ſuch a Term, and conſequently the Money ſecured by it.

Demandray verſus *Metcalf.*

Caſe 279.
2 Vern. 691. S. C.

A. borrows 200 *l.* on the Pawn of ſome Jewels, afterward he borrows three ſeveral Sums, for each of which he gives his Note, without taking Notice of the Jewels; His Executors ſhall not redeem the Jewels without paying the Money due on the Notes.

THIS was a Caſe wherein my Lord *Chancellor* took Time to conſider, and be attended with Precedents, and was ſhortly thus: A Man borrows 200 *l.* on the Pawn of ſome Jewels, worth about 600 *l.* and takes a Note from the Pawnee, acknowledging the Jewels to be in

in his Hands for securing of the 200 *l.* afterwards the Pawner borrows at several Times three several other Sums of Money of the Pawnee, and gives his Note for each Sum, without taking any Manner of Notice of the Jewels, and dies.

His Executors brought this Bill to redeem the Jewels, on Payment of the 200 *l.* first lent thereon, and Interest; and the only Question was, Whether he should not likewise pay the other Sums secured by his Testator's Notes before he should be admitted to redeem, and the Plaintiffs were to produce Precedents, that the Redemption might be on Payment of the first Sum and Interest only, but could not find any Precedents.

My Lord *Chancellor* now gave his Opinion, that the Plaintiffs must pay all the Money due on the several Notes; and said, since there were no Precedents to guide him, he thought the constant Maxim of this Court sufficient for that Purpose, *viz.* that he who will have Equity, or comes hither for Equity, must do Equity; and since the Plaintiff cannot have back these Jewels, without the Assistance of this Court, it is reasonable and just he should pay the Defendant all Moneys due to him; for it is natural to suppose the Pawnee would not have lent him those Sums, but on the Credit of the Pledge he had in his Hands before; and said, the nearest Case he could find that came to this was, the Case of *St. John* and *Holford*, 1 *Chan. Ca.* 97, tho' he agreed that Case might be distinguished from this, being between the Heirs of the Mortgagor and Sureties; but he said, tho' the Reason he now gave for his Opinion be not mentioned in that Case, as the Reason of the Resolution; yet the Case would well enough have admitted it, and the Decree was accordingly; but Mr. *Vernon* said, if there had been any Creditors of the Pawner by Bond, or a Commission of Bankruptcy out against him, the Defendant must come behind them for his Debts on the several Notes, and could not have tacked them to the Pawn, so as to prefer himself before them; but that not being

the preſent Caſe, My Lord decreed, that if the Plaintiff would redeem, the Time for Payment being lapſed, he muſt pay all; and he likewiſe declared his Opinion, that if the firſt Sum had been ſecured by a Mortgage of Lands, he ſhould not have been admitted to redeem after the Day for Payment was lapſed, without paying likewiſe all that was due to the Mortgagee on Notes, or Simple Contract; otherwiſe if ſuch ſubſequent Debts had been ſecured by Bond.

Seal verſus *Seal*.

Caſe 280.

A Deviſe of a Perſonal Eſtate to one in Tail, Remainder over, the Remainder is void.

IN this Caſe a Man being ſeiſed of a good Real Eſtate, and alſo poſſeſſed of a conſiderable Perſonal Eſtate; and having an Intention to ſettle and ſecure both in his Name and Family, does by his Will in Writing, after ſeveral Legacies, and Bequeſts, give and deviſe all the reſt and reſidue of his Real and Perſonal Eſtate to the Plaintiff, and the Heirs Male of his Body to be begotten, for ever; and for want of ſuch Iſſue, to the Defendant and the Heirs Male of his Body to be begotten, for ever; with like Remainders over to ſeveral others of the ſame Name, and makes the Defendant his Executor, and dies.

And now this Bill was brought to have an Account of the Perſonal Eſtate, and that the Plaintiff might enjoy the ſame to his own Uſe abſolutely, the Remainder over being void; and the Defendant brought a Croſs Bill, upon Pretence that there were Directions in the Will, to have the whole Perſonal Eſtate veſted in the Purchaſe of Lands to be ſettled in the Manner abovementioned.

But upon reading of the Will, my Lord *Chancellor* was clear of Opinion, that theſe Directions extended only to ſuch Part of the Perſonal Eſtate, as was not upon Government Security (which was about 8000 *l.* or 9000 *l.*) and for the Reſidue, which amounted to about 14 or 15000 *l.* that was plainly taken no further Notice of, than

than in the Devise above mentioned, of all the rest and residue of his Real and Personal Estate.

For the Plaintiff it was said, as to that, that the Devises over were absolutely void, and the whole vested in the Plaintiff, as not being capable of bearing any further Limitation, and this Point the Defendant's Council gave up; but then they insisted, that the Intent of the Testator appearing to be to continue the Real Estate, and the Lands to be purchased in the Name of the Testator, this Court would Order the Settlement to be made in such Manner, that the Plaintiff might not have Power to defeat the Remainders; and therefore, that the Plaintiff should be only made Tenant for Life, with Remainder to his first and other Sons in Tail Male, and so for the others in Remainder; and the *Attorney General* said, the House of Lords had in a Case lately made the like Provision for the Benefit of the Issue, that they may not be defeated by the Father.

But my Lord *Chancellor* said, it was in a Case of Marriage Articles, where the Intent was plain to provide for the Issue of the Marriage; but here the Testator himself has expresly given it to the Plaintiff in Tail Male; and therefore he thought this Court could not vary the Limitation; besides, that the Defendant has a chance for the Remainder, if the Plaintiff should die without Issue before any Recovery suffered; and mentioned a Case where such Remainder took Place, by the Death of Tenant in Tail without Issue, before he could compleat a Recovery; and therefore ordered a Settlement in this Case to be made in the like Manner, and the Deeds and Writings to be brought before the Master for that Purpose.

Howell versus *Price.*

Case 281.
2 Vern. [illegible].
S. C.
A Mortgage in Fee is made redeemable, on Payment of [illegible] *l.* and Interest, upon any *Michaelmas Day.* Mortgagor dies, having devised his Personal Estate to his Wife, there being no Covenant for Payment of the Mortgage Money, whether the Personal Estate in the Wife's Hands shall be liable.

ONE *Davids* made a Mortgage of Lands in *Wales*, by way of Lease and Release, to one *Reynolds*, and his Heirs, in Consideration of 300 *l.* and the Proviso was, that if *Davids*, or his Heirs or Assigns, should on *Michaelmas-Day* 1702, or any *Michaelmas-Day* following, pay to *Reynolds*, his Heirs or Assigns, the Sum of 300 *l* and all Arrears of Rent or Interest, which should be then due, then the said Conveyance was to cease; but in this Conveyance was no Covenant for Payment of the Money as usual, but only a Covenant for quiet Enjoyment, and that the Estate was free from Incumbrances. *Davids* pays the Interest of this Money during his Life, and settles the Lands themselves to the Use of himself for Life, Remainder to *Mary* his intended Wife for Life, for her Jointure, Remainder to his own Right Heirs; and after having Issue by his Wife, one only Daughter, named *Maud*, he by his Will gives several Legacies; and after devises in these Words: All the rest and residue of my Personal Estate, I give and devise to my Wife *Mary* and my Daughter *Maud*, whom I also make joint Executors, as well to pay my Debts, as to levy my Debts, and dies. *Maud* the Daughter was then an Infant, and died soon after, under Age, and without Issue.

This Bill was brought by the Plaintiff, and his Wife, who was Heir at Law to *Davids*, against *Mary* his Widow and Executrix, and against the Assignee of the Mortgage to be let into a Redemption of the Estate; and that the Personal Estate in the Hands of the Widow and Executrix, might be applied in Ease and Exoneration of the Real Estate, for the Benefit of the Widow and Heir at Law.

But my Lord *Chancellor* thought this a quite different Case from those wherein such Directions have been given, and said, that there being no Covenant for Payment of the Money, there was no Contract at all be-

tween them, neither express nor implied, nor would any Action lie against the Mortgagor, to subject his Person, or compel him to pay this Money; but this was in Nature of a conditional Purchase, subject to be defeated on Payment by the Mortgagor, or his Heirs, of the Sums stipulated between them at any *Michaelmas-Day*, at the Election of the Mortgagor, or his Heirs; so that here was an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, which could not be forfeited at Law, like other Mortgages; and therefore there could be no Equity of Redemption, or any Occasion for the Assistance of this Court; but the Plaintiffs might even at Law defeat the Conveyance, by performing the Terms and Conditions of it, which were not limited to any particular Time but might be performed on any *Michaelmas-Day* to the End of the World; and since here was no Covenant or Contract, either express or implied, to Charge the Personal Estate of the Mortgagor, he thought there was no Reason to lay the Load of this Debt, upon that, which was given to other Persons; and tho' *Maud*, who was Joint-Executrix with the Defendant, was also Heir at Law to the Mortgagor, yet he did not think her Moiety of the Personal Estate ought to be applied towards discumbring this Estate, but must go to the Defendant as the surviving Residuary Legatee; and for the Expression in the Will concerning the Payment of his Debts, that being coupled with the other Words, *Whom I make Joint-Executors, as well to pay my Debts, as to levy my Debts*, show that he meant such Debts as belonged to the Office of an Executor, which this did not, there being no Remedy against them, for want of a Covenant for that Purpose; and it was at the Election of the Heirs of the Mortgagor for ever, Whether they would redeem this Estate or not; but he agreed, if a Redemption were now to be of it, the Defendant having the Estate in Jointure for her Life, must pay one Third, and the Plaintiff the Heir at Law, the other two Thirds of the principal Money; and that in the mean Time the

Defendant must keep down the Interest of it; but there being some other Points in the Case, which required a further Discussion, and might be properly triable at Law, my Lord made no Decree, but ordered them to search for Precedents. *Note*, It was said to be a common Practice in *Wales* to make Mortgages in this Manner, with Design to keep the Estate for ever in their own Family.

White versus *Thornborough* & al'.

Case. 28[illegible]

Where a Court of Equity will carry Marriage Articles into Execution, tho' to the defeating of Creditors.

ISaac Jackson, the Plaintiff *Mary*'s Father, being seised in Fee of a Freehold Estate, and also of a Copyhold Estate; and having married an Orphan of the City of *London*, does after Marriage, (in Consideration of 1700 *l.* which was her Portion, and was but then paid him by Indenture the 1st of *October* 1678) covenant with the Chamberlain of *London*, and another Person, to levy a Fine of the Freehold Estate, to the Use of himself for Life, Remainder to the Use of *Mary* his Wife for Life, for her Jointure, Remainder to the Heirs Male of his Body, on the Body of the said *Mary* to be begotten, with Remainder to his own right Heirs; and by the same Indenture covenants to surrender the Copyhold Estate to the same Uses; the Copyhold was not surrendred, nor was any Fine ever levied of the Freehold. After this, he had Issue by his said Wife, *Abraham* his only Son, and *Mary* his only Daughter, the Wife of the now Plaintiff, and died: After his Death *Mary* his Widow brought a Bill, and had a Decree to hold and enjoy the Estate during her Life. *Abraham* her Son contracted Debts to the Value of 1400 *l.* for which the Defendants became his Sureties; and for the better securing the Payment of those Debts, *Abraham* does by Indenture in *August* 1714, covenant to levy a Fine of his Freehold Estate, to the Use of *Mary* his Mother, who was then living, for Life, Remainder to the Defendants for 500 Years, Remainder to himself in Fee; and the Trust of the Term was declared to be for Payment of the 1400 *l.* and Interest, with

with a Covenant for further Aſſurance; and at the ſame Time *Abraham* ſurrenders his Copyhold Lands to the ſame Uſes: After this, *Abraham* makes his Will, and thereby deviſes all his Freehold and Copyhold Lands to the Defendants, for the better indemnifying them againſt the ſaid 1400 *l.* and Intereſt, and makes them Executors, and then goes a Voyage into the *Eaſt-Indies*, where he died without Iſſue, leaving the Defendant *Anne* his Widow and Relict; no Fine was ever levied by him of the Freehold Eſtate purſuant to the ſaid Indenture; and *Mary* the Plaintiff's Mother being dead, the Plaintiffs brought this Bill for a diſcovery of Writings, and an Account of the Rents and Profits of the Real Eſtate, as belonging to the Plaintiff *Mary*; and that the Defendants might likewiſe be obliged to ſurrender back the Copyhold Eſtate as belonging to the Plaintiff.

My Lord Chancellor *Harcourt* decreed accordingly, ſaving only the Defendant *Anne*'s Dower out of the Freehold Eſtate; and the Reaſon of his Decree was, that he took the firſt Indenture to be only in the Nature of Articles for a Settlement; and that if a Bill had been brought to have carried it into Execution, the Settlement would have been ſo, as to have made both the Son and Daughter Purchaſors of the reſpective Remainders; and as to the Copyhold, that being to be intailed by the Articles, could not afterwards by a bare ſurrender be defeated, without a particular Cuſtom had been found to have warranted it. From this Decree the Defendants now appealed.

For the Plaintiffs it was argued, that they were Purchaſors under the firſt Settlement made by the Father, in Conſideration of 1700 *l.* Portion paid; that tho' this Deed was executed after Marriage, yet the Portion being paid at the ſame Time, it could not be looked upon to be voluntary, but would be as effectual as a Settlement made before Marriage, and ſo has always been held where the Portion was paid at the Time of making the Settlement, that if the Fine had been levied purſuant to this Deed

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of Covenant, there had been no Queſtion but it had been an effectual Settlement; and then *Abraham* the Son being Tenant in Tail, his Covenants to levy a Fine could not have bound his Iſſue, much leſs the Plaintiff *Mary* who claimed as a Purchaſor, by Way of Remainder as Heir of the Body of her Father; that tho' no Fine were levied, yet in a Court of Equity it was to be looked on as the ſame Thing; and there is no Doubt but if a Bill had been brought by the Truſtees in the Father's Life Time, this Court would have obliged him to compleat the Settlement by levying the Fine; that the Plaintiff *Mary* was a Purchaſor for a valuable Conſideration under this Settlement, and therefore ought not to loſe the Benefit of it; that as to the Copyhold that was actually ſurrender'd to the Uſes of the firſt Deed; and then *Abraham* being Tenant in Tail thereof, could not without a particular Cuſtom for that Purpoſe defeat either his Iſſue, or the Plaintiff, by a bare Surrender; and therefore it was pray'd that the former Decree might ſtand.

On the other Side it was argued, that the Defendants were juſt Creditors for 1400 *l.* that if the Eſtate were taken from them, they muſt intirely loſe their Debts; that no Fine being levied purſuant to the firſt Deed, the legal Eſtate continued ſtill in the Father, and from him deſcended to *Abraham* his Son, and he had by his Will deviſed it to the Defendants; that it was very extraordinary for the Plaintiffs to aſk the Aſſiſtance of a Court of Equity to take it from them; that *Abraham* the Son was but Tenant in Tail in Equity, and therefore, tho' he did not levy a Fine, yet that was not material, for a Bargain and Sale, a Feoffment, or Covenant, to levy a Fine by ſuch an equitable Tenant in Tail, has been held ſufficient to bind his Iſſue; and ſo it was ſettled in the Caſe of *Allee* and *Allee*, where that Point came ſolemnly in Debate, that tho' the Plaintiff claimed by Way of Remainder, as Heir of the Body of her Father, yet it was ſuch a Remainder as was actually veſted in the Son; and if the Settlement had been perfected, he might by

his Fine have barred, not only his own Issue, but also the Plaintiff, and then his Covenant to levy a Fine ought in Equity to have the same Effect; that as to the Copyhold Estate, there could be no Doubt but that was effectually vested in the Defendants; that there could be no Intail of a Copyhold, or if there could, yet a bare Surrender by such Copyholder has been always held sufficient to bind his Issue, unless some particular Custom were found; that a Common Recovery was needful, and therefore it was pray'd the Decree may be reversed.

But my Lord *Chancellor* said, he thought, if this Deed of Covenant were to be looked upon only in the Nature of Articles, then if a Bill had been brought to have carried it into Execution in the Life Time of the Father, the Court would have decreed the Limitation to have been to the first Son, and the Heirs Male of his Body, with Remainders to the Daughters, and the Heirs of their Bodies begotten, the Remainder to the Heir of the Body of the Father; and in such Case, tho' the Son by a Common Recovery might have barred the Remainder to the Daughters, yet they would have a Chance for it, in Case no such Recovery had been; which shows the reasonableness of pursuing strictly the Intent of such Agreements; for the Tenant in Tail, through Ignorance or Forgetfulness may omit to suffer such Recovery, or he may be prevented by Death before he has compleated it, and then the Remainder will take Place; but he thought in this Case, from the Circumstances of paying the Portion at the same Time, and the Chamberlain of *London* being a Party, that it was more than Articles, and ought to be looked on as a Settlement, tho' he said it was a very infirm and imperfect one; but taking it as a Settlement, then by the Limitations thereof, as they now stand, tho' the Son would have had both Estates in him, and might by a Fine have barred them, yet his Covenant to levy a Fine only cannot affect the Plaintiff, who now derives her Title, not under the Son, but as Heir of the Body of

her Father, *per formam doni*, and is in Paramount the Eſtate in Tail Male, which the Son took.

But as to the Copyhold Eſtate, he ſaid, that could not be looked upon as a Fee Simple conditional (which the Council for the Plaintiffs contended for, not being able to ſupport it as an Entail) and that the Son could not alien it before the Condition performed by having of Iſſue; for that every Body knew Copyhold were at firſt but a kind of Tenure in Villenage, and in reſpect of their baſe Nature, determinable at the Will of the Lord, though now indeed they have been improved and hardned by Time; but *Prima Facie*, it muſt be taken, that a Surrender by ſuch Tenant in Tail will bind his Iſſue, unleſs a particular Cuſtom were found, that there ought to have been a Common Recovery, and that not appearing in the Caſe, he thought the Defendant had a good Title to the Copyholds; and therefore revers'd the former Decree as to that, but affirmed it as to the Freehold.

But, *Note*, ſeveral at the Bar were diſſatisfied with this and the former Decree as to the Freehold, and thought that the Defendants having the Eſtate in Law in them by the Deviſe, and being juſt Creditors, ought not to have had this Eſtate taken from them by the Aſſiſtance of a Court of Equity, and thought the Diſtinction of an infirm Settlement unintelligible.

Note likewiſe, in this Caſe the Defendants themſelves had by their Anſwer plainly confeſſed, that they had Notice of the firſt Deed at the Time they became Sureties, and took the Son's Covenant to levy the Fine.

DE

DE
Termino S. Hillarii, 1715.
In Curia Cancellariæ.

Case 282. In Court Lord *Cowper*. *A.* deviſes in theſe Words, Imprimis, *I will and deviſe, that all my Debts, Legacies, and Funerals ſhall be paid and ſatisfied in the firſt Place*; theſe Words amount to a Charge on the Real Eſtate, if the Perſonal is not ſufficient for that Purpoſe.

Trott verſus *Vernon*.

A Man being ſeiſed of a Real Eſtate, and alſo poſſeſſed of ſome Perſonal Eſtate, makes his Will in Writing, and thereby deviſes in theſe Words, Imprimis, *I will and deviſe, that all my Debts, Legacies, and Funerals ſhall be paid and ſatisfied in the firſt Place.* Item, *I give and deviſe*, and then proceeds to diſpoſe of his Real and Perſonal Eſtate; and his Perſonal Eſtate not being ſufficient, the Queſtion was, Whether that Clauſe in his Will ſhould amount to a Charge on his Real Eſtate for the Payment of his Debts, Legacies, and Funeral.

My Lord *Chancellor* was clear of Opinion that it ſhould, for as to his Debts, it was but natural Juſtice they ſhould be paid, and his Perſonal Eſtate would have been liable to the Payment thereof, whether he had given any Directions in his Will about them, or not; when therefore he wills and deviſes, that his Debts, Legacies, and Funeral ſhall be paid and ſatisfy'd, in *the firſt place*, theſe Words muſt be intended to give a Preference for thoſe Purpoſes, to any other whatſoever; and ſince he

does not deviſe his Real or Perſonal Eſtate to any Perſon in particular; for theſe Purpoſes the Perſons who come within that Deſcription, muſt be ſuppoſed to be within his View; and it muſt be taken as a Deviſe for their Benefit, preferable to any Diſpoſition whatſoever, either of his Real or Perſonal Eſtate, and conſequently both of them are made liable thereto.

Pagett verſus *Hoskins*.

Caſe 283.

PEter *Whitcombe* being a Freeman of *London*, and having Iſſue two Daughters only by a former Venter, makes his Will, and thereby deviſes 6000 *l.* apiece to his ſaid two Daughters, and makes his ſecond Wife Executrix, and dies; the Widow after his Death proves his Will; and on a Treaty of Marriage to be had between her and Sir *Bennet Hoskins*, ſhe gives in an Eſtimate of Mr. *Whitcombe*'s Perſonal Eſtate, amounting to about 18000 *l.* whereof 6000 *l.* being her own Share, ſhe had taken Tallies and Orders to that Value into her own Hands, and propoſes to have a Settlement made on her by Sir *Bennet* adequate to that Fortune.

A Freeman of *London* having Iſſue two Daughters, deviſes 6000 *l.* apiece to them, and makes his Wife Executrix; by an Eſtimate it appeared that his Perſonal Eſtate at his Death was 18000 *l.* to 6000 *l.* of which the Widow being intitled, *A.* her ſecond Huſband, in Conſideration thereof, ſettled a Jointure of 600 *l.* *per Ann.* Afterwards a Loſs of 12000 *l.* befell the Freeman's Eſtate; and tho' the Wife was dead, and it was urged, that the ſecond Huſband was a Purchaſor of her Fortune, yet decreed, that the Daughters ſhould have a proportionable Recompence out of the 6000 *l.*

Thereupon by Articles reciting a Marriage intended to be had between her and Sir *Bennet Hoskins*; and that it was computed her Fortune upon the Account would come out to be 6000 *l.* Sir *Bennet* in Conſideration thereof, agrees to ſettle upon her by Way of Jointure 600 *l.* *per Ann.* for Life; and ſhe at the ſame Time makes an Aſſignment of the Dower ſhe was intitled to, out of Mr. *Whitcombe*'s Real Eſtate to Truſtees in Truſt, to make good to Sir *Bennet* any Loſs or Deficiency that might happen to the leſſening of her 6000 *l.* Fortune.

The Marriage takes Effect, and Sir *Bennet* receiving the 6000 *l.* ſettles 600 *l.* *per Ann.* on his Wife, for Life,

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pursuant to the Articles; and it happening afterwards, that a Loss of 12000 *l.* really befell Mr. *Whitcombe*'s Personal Estate, this Bill was now brought by the Daughters, after the Death of my Lady *Hoskins*, and Sir *Bennet*, who survived her, against the Defendant, who had taken out Letters of Administration to Sir *Bennet*, for an Account of his Personal Estate; and to have a proportionable Recompence thereout, for their Shares of the 6000 *l.* that now as the Case fell out, being all the Personal Estate Mr. *Whitcombe* had left; and it was decreed accordingly by my Lord *Harcourt* to a general Account; but afterwards on a Rehearing his Lordship varied that Decree, and directed an Account of the Personal Estate (exclusive of the 6000 *l.*) from which Decree the Plaintiffs now appealing to my Lord Chancellor *Cowper*,

It was insisted upon for the Plaintiffs, that they ought to have an Account of the Personal Estate at large; that if they should not have this Account, they would be intirely defeated of their Portions; that this 6000 *l.* was all that was left; and Sir *Bennet* having Notice that it was subject to an Account, ought to be affected with it, especially as this Case is, where he has provided himself with a Recompence, in Case of any Loss or Deficiency, that otherwise it would be in the Power of any Woman, who was an Executrix, to give away all her Testator's Assets with herself in Marriage, and so defeat Trust Creditors of their Debts, the Consequence whereof would be, that none from henceforth would run that Hazard, and so no Women would be made Executors; that tho' Sir *Bennet* is in the Nature of a Purchasor of this 6000 *l.* by his Settlement, yet he appears to be a Purchasor with full Notice; and therefore his Assets ought to be liable to the Plaintiff's Satisfaction, and cited 2 *Vent.* 360. *Hodges* and *Waddington.*

On the other Side, it was argued by Mr. *Vernon* and others, that if an Executrix commits a Devastavit, and marries, the Husband shall be liable, even at Law, during

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the Coverture, to make it good; but after her Death no Suit can be maintained against him at Law, whatever Fortune he had with her; that in Equity indeed it has been held, that any Specifick Assets of the Wife's Testator may be followed in the Hands of the Husband after her Death; so for any Thing which he has meerly in Right of his Wife, he shall be liable in this Court, so far as that extends, to make good any Devastavit committed by his Wife before Marriage; but for the Fortune at large of the Wife, it was never yet carried so far, as to charge the Husband on Account thereof, after her Death, especially where the Husband, as in this Case was a Purchasor of his Wife's Fortune, for a valuable Consideration, by making a Settlement on her; that if the Wife before Marriage had sold these Tallies and Orders to any Stranger, and wasted the Money, the Plaintiffs could never have come against the Purchasor for a Recompence; that the Husband was equally a Purchasor in this Case, and ought not to be affected by this accidental Loss, which has since happened in Mr. *Whitcombe*'s Assets; that if it were otherwise, there would be no dealing with an Executor; and where a Woman was made Executrix, she must never expect to marry.

But my Lord *Chancellor* said, that Sir *Bennet Hoskins* taking Notice in the very Articles, that this very 6000 *l.* was part of her first Husband's Personal Estate, and that too, upon an Account open and unliquidated, he comes in as a Purchasor thereof, subject and liable to that Account, and can be intitled to it no otherwise; he does not take it as a stated liquidated Sum whereto his Wife was intitled; but as so much as upon the Account might be coming to her; and therefore takes it subject to the Event of that Account, and has accordingly provided himself of a Recompence, in Case it should fall out to be less; and therefore he thought, that the second Decree which excluded the 6000 *l.* out of the Account was wrong; and that the first Decree was right, and ought to stand.

But

But Mr. *Vernon* ſeemed to be much diſſatisfied with this Decree, and apprehended the Conſequence of it might be very dangerous to Perſons who ſhould deal with Executors for the Purchaſe of their Teſtator's Aſſets; but my Lord *Chancellor* ſaid, that Inference could not be made from this Decree, which was founded wholly on the Circumſtances of the Caſe.

Note, A Caſe was cited, when this *Chancellor* had the Seals before, where an Executor being poſſeſſed of a Term for Years in Right of his Teſtator; and being indebted to one in a Sum of Money on his own Account, agreed with his Creditor for the Sale of this Term; and that the Debt ſhould be diſcounted out of the Purchaſe Money; and yet upon a Bill brought againſt him by the Creditors of the Teſtator, he was not allowed to ſink his own Debt, but was decreed to pay the Money, becauſe he purchaſed with full Notice; that this was a Teſtamentary Eſtate, and nothing came into the Executor's Hands as an Equivalent for it, to make up the *Quantum* of the Teſtator's Aſſets.

DE
Term. S. Trinitatis,
1716.
In CURIA CANCELLARIÆ.

Stanhope versus *Thacker*.

Case 284.

Father and Son on the Son's Marriage, by Lease and Release, convey Lands to Trustees and their Heirs, to the Use of the Father for Life, Remainder to his Wife for Life, Remainder to the Son for 99 Years, if he should so long live, Remainder to Trustees during his Life, to support Contingent Remainders, Remainder to the Son's intended Wife for Life, for her Jointure, Remainder to the first, and every other Son of that Marriage in Tail Male, Remainder to the Daughter or Daughters of that Marriage, and the Heirs of their Bodies, 'till they shall, out of the Rents, Issues and Profits, have received 3000 *l.* Remainder to the Heirs of the Body of the Son, Remainder to the second Son of the Father, and to his first and other Sons, Remainder to the Right Heirs of the Son for ever. There were Issue of the Marriage only two Daughters, who being in Possession after all the particular Precedent Estates determined, suffer, a Common Recovery, and it was held, that this was no Bar of the subsequent Remainders, the Limitation to them being only a Security, 'till the 3000 *l.* was raised.

Gilbert Thacker, the Father of *Gilbert Thacker* his Son, on the Marriage of the Son, by Indentures of Lease and Release, in the Year 1670, convey certain Lands to Trustees and their Heirs, to the Use of *Gilbert* the Father for Life, then to *Jane* his Wife for Life, Remainder to *Gilbert* the Son for 99 Years, if he should so long live, Remainder to Trustees and their Heirs during his Life, to support Contingent Remainders, Remainder to the intended Wife for Life, for her Jointure, Remainder to the first and other Sons of that Marriage in Tail Male successively, Remainder to the Daughter and Daughters of that Marriage, and the Heirs of their Bodies, 'till they shall out of the Rents, Issues, and Profits of the said Premisses, have raised and received the Sum of 3000 *l.* and after the said Sum raised, or in Case there be no such Daughter or Daughters; then to the Heirs of the Body of *Gilbert* the Son, Remainder to *Francis* *Thacker*,

Thacker, the second Son of old *Gilbert*, and to his first and other Sons in Tail Male successively; and so in like Manner to *John Thacker*, a third Son of old *Gilbert*; and to his first and other Sons in Tail Male successively, Remainder to the Right Heirs of *Gilbert Thacker* the Son for ever.

The Marriage takes Effect, and they have Issue only two Daughters, who being in Possession, after all the other Estates determined, which were precedent, suffer a Common Recovery to the Use of themselves and their Heirs, and one Question in this Case was, Whether by this Recovery the Remainders were not barred.

And it was argued, that they were, because the primary Intention of this Limitation, was to make them Tenants in Tail; and the raising of the 3000 *l.* was but the Secondary Intention thereof; and when they being so Tenants in Tail, suffer a Common Recovery, this bars their Estate Tail, and the Remainders depending thereon; and for this was cited and relied on a Case in Point, *Benson* and *Hudson*, 1 *Mod.* 108, to 112, and the several Cases there put by my Lord Chief Justice *Hale*.

But as to this Point my Lord *Chancellor* was clear of Opinion, both upon the first speaking to it, and the next Day after, that this was but in the Nature of a Security for the 3000 *l.* and tho' the Recovery barred the Estate Tail, and Remainders at Law, yet the Daughters were but in the Nature of Trustees, after the 3000 *l.* raised, for those in Remainder; that before the Recovery, they had but an Estate Tail for their Security for that Sum, that now after the Recovery they had the Fee-Simple; but still the same in a Court of Equity was but a Security, 'till that Money raised; that those in the Remainder had the Equity of Redemption in the same Manner as the Person who made that Security would have had, if no such Limitation in Remainder had been; that therefore they might at any Time, by paying off that 3000 *l.* determine the Estate of the Daughters, and then the Daughters would be but Trustees for them; that

this 3000 *l.* being to be raised out of the Rents, Issues, and Profits, if the Ordinary or Annual Rents and Profits of the Lands would not raise the Money in a convenient Time to answer the Intent of the Settlement, which was to provide Portions for the Daughters; that in a Court of Equity the same might be decreed to be raised by a Sale or Mortgage thereof, which were the extraordinary Profits of the same Lands; and tho' in this Case the Daughters had been in Possession of those Lands for some Time, and received the Rents and Profits thereof, yet they might still supply any Deficiency in the raising of these Portions by Mortgage or Sale, and the Rents and Profits already received should be applied, in the first Place towards the Interest of the 3000 *l.* and the Residue received towards the Principal, and what should fall short to be made up by a Sale or Mortgage; otherwise, if they should be confined to raise the 3000 *l.* out of the Annual Rents and Profits, only they would be eating out their Portions, and might never have any Sum adequate to the Provision intended to them.

Another Point in this Case was, Whether the Remainder to the Heirs of the Body of *Gilbert* the Son, and the last Remainder to the Right Heirs of the said *Gilbert*, should vest in such Heirs of the Body, or Right Heirs by Purchase; for it seems the two other Sons of old *Gilbert* were dead, without Issue.

And it was argued it should, because *Gilbert* the Son taking but an Estate for Years, and the Remainder being limited expresly to Trustees and their Heirs, during his Life; that the Remainder must vest in the Heirs, or Heirs of his Body by Purchase, he having no Estate of Freehold.

But on the other Side it was argued, that the Son joined with his Father, and therefore it was to be presumed that the Father had but an Estate for Life; and that the Inheritance moved from the Son, and then it was his old Reversion in him; and upon this Occasion were cited the Case of *Fenwick* and *Mitford*, 2 *Co.* 91.

Co.

Co. Lit. 22 *b.* and *Pibus* and *Mitford*, 1 *Mod.* 98, that a Man cannot make his Heirs, or Heirs of his Body Purchasors, without departing with the whole Fee-Simple; that here he had not so done, because having but an Estate for Years, the old Estate for Life continued in him; and being coupled with the Remainder to the Heirs of his Body, and that to his Right Heirs, must necessarily derive the Estate to them by Descent.

But to this it was replied, that the Estate being limited to Trustees during his Life, entirely varied this Case from those which had been cited; that this Sort of Limitation was not thought of at the Time of those other Cases, but was entirely new, and found out long after; that by Reason thereof he could not be said to have any resulting or old Use during his Life; and that it had been so adjudged in the Case of *Tippin* and *Cosuns*, by my Lord Chief Justice *Holt*, and all the Court, which Case is reported in 4 *Mod.* 380; tho' the Judgment is not there mentioned.

But this being meerly a Point of Law, and it not appearing, whether *Gilbert* the Son had any, or what Estate, tho' he joined in the Conveyance, whether an Estate Tail with a Reversion to old *Gilbert* in Fee, or whether he had a Remainder in Fee, or what other Estate.

My Lord *Chancellor* order'd an Ejectment to be brought, and on a special finding of this Matter, the Question to be argued and determined at Law, and said, that he thought it a very nice Point.

Note, The very same Point came in Question before my Lord Chancellor *Harcourt*, in the Case of *Ewer* and *Howard*, but was not determined.

DE
Termino S. Mich.
1716.
IN CURIA CANCELLARIÆ.

Sympson versus *Hornsby*. Case 285.

THE Question in this Case arose upon the Will of one *Thomas Addison*, who having a Wife, and only two Daughters, devised Lands in several Towns to his Wife for Life, for her Jointure; and afterwards towards the Close of his Will devises all his Lands, Tenements, and Hereditaments in those Towns, after the Death of his dear Wife, to his Daughter *Bridget*, and the Heirs Males of her Body; and for want of such Issue, to his Daughter *Jane*, (who was his eldest, but had disobliged him by marrying improvidently) and her Assigns, during her natural Life; and after her Death, to her first and other Sons in Tail Male successively, with several Remainders over: *Bridget* dies in her Father's Life Time, leaving Issue a Son, whom the Grandfather took to his own House, and expressed much Kindness for; afterwards the Grandfather makes a *Codicil*, which began thus, *a Codicil to be annexed to my Will*, and by that he gives some Part of a Leasehold Estate (which by his Will was given to his Daughter *Bridget*) to her Son, adds another Trustee for some Charities he had given by his Will, and then duly

executed this Codicil; but the Codicil was not actually annexed to his Will, so that the Execution of that could not amount to a Republication of his Will; and now the Questions were,

1st, Whether the Wife took an Estate for Life in the Lands remaining undisposed of by Implication. 2dly, Whether the Son of *Bridget* could take at all.

An Heir at Law cannot be disinherited but by a strong and necessary Implication.

As to the first Point, the Court seemed pretty clear, that the Wife took no Estate for Life by Implication, because the Implication which shall disinherit an Heir at Law, must be necessary; and here was no necessary Implication, tho' the Daughters were Heirs, because it may be intended to extend only to those Lands which were before expresly devised to the Wife for Life, that they should not have them till after her Death; but for the others, they should go to them immediately, and therefore, the Will shall be taken distributively according to the Case of *Cock* and *Gerrard*, 1 *Saund.* 180, 1 *Lev.* 212.

Devise of Lands to *A.* and the Heirs Male of his Body. *A.* dies in the Life Time of the Testator, leaving Issue; the Devise is void, and the Issue cannot take.

As to the second Point, it was argued, that the Son of *Bridget* could take nothing in this Case, that as in *Brett* and *Rigden*'s Case, the Word Heirs was only to denote the Quantity of the Estate; so in this Case the Words Heirs Males of her Body, were only to express the Quantity likewise, that is, in the one Case the Devisee was intended to take a Fee-Simple, so in this Case the Devisee was intended to take a Fee-Tail, and in neither Case were the Word Heirs or Heirs Males of the Body, any Description or Designation of the Person who was to take by Purchase; that in Case of such a Devise in Fee the first Taker might immediately dispose of, and give it away from his Heirs, so might the Devisee in this Case too by proper Conveyances; that this Point has been settled long since in *Hartopp*'s Case, in *Cro. Eliz.* 243; that this was held clear likewise in my Lord *Lansdown*'s Case, lately in the *King*'s-*Bench*, where my Lord of *Bath* devised Lands to *Bernard Granville*, and the Heirs Males of his Body, and *Bernard* dying in the Life Time of the Testator,

Teſtator, leaving Iſſue Male, the Teſtator my Lord of *Bath*, afterwards made a Codicil, and the Will and Codicil, both lying together upon the Table, my Lord took up the Codicil, and ſaid, this was his Will, and then publiſhed and executed it in the Preſence of three Witneſſes, and when he had done, put both the Will and Codicil together in a Box; and yet in that Caſe it was held, that this making of the Codicil was no Republication of the Will being not affixed together; and then the Heirs Males of the Body of *Bernard Granville* could not take, no more can they in this Caſe neither; that admitting the making ſuch Codicil might amount to a Replublication of the Will, yet whilſt the Words of the Will continued as they were, the Heirs Male of the Body could not take, no more than a Grandſon could take, as Son, by ſuch Republication; according to the Caſe of *Steed* and *Berries*, 1 *Vent.* 341. 2 *Mod.* 313, that a Codicil was a diſtinct Inſtrument of itſelf; and if the making of that ſhould amount to a Republication of the Will, it would entirely elude the Statute of *Frauds* and *Perjuries*; that in Lord *Lanſdown*'s Caſe, indeed, upon the Importunity of great Council a ſpecial Verdict was directed to be found, tho' the Court were clear of their Opinion as to the Point; and that Caſe was afterwards agreed by the Parties, that in 1 *Sid.* 53, 78-9, a like Deviſe to four Daughters was held void for a fourth Part, by the Death of one of the Daughters, in the Life Time of the Teſtator; and ſo was likewiſe the Caſe of *Popham* and *Bamfield* in this Court.

Making a Codicil and annexing it to the Will, no Republication of the Will.

My Lord *Chancellor* was clear of Opinion, that the Codicil in this Caſe could not help them; but he ſaid the Conſtruction of Law in thoſe Caſes was extreamly rigid and ſevere; that the Teſtator in this Caſe moſt certainly meant, that *Jane* ſhould have nothing whilſt there remain'd any Iſſue Male of *Bridget*; that he would conſider of the Will, and if any Thing could be found to diſtinguiſh this Caſe from thoſe which have been cited, he would give Relief for a Moiety; but if not, the

the Cafes were too ftrong, and he muft fubmit to be bound by them; and afterwards gave his Decree accordingly; which *Vid. Inf.*

Cafe 286.

Brown verfus *Barkham.*

A. Devifes Lands in Truft after Debts paid, to convey the Premiffes to the Heirs Male of the Body of *B.* the Teftator's Great Grandfather *C.* is the Heir Male of the Body of *B.* but not Heir general, there being a Daughter of an elder Brother, who is Heir general. Whether the Truftees are to convey to *C.* as *C.* would be well intitled to take as Heir Male by defcent, fo he is fufficiently defcribed to take by Purchafe.

SIR *Edward Barkham* being feifed in Fee of the Lands in Queftion, by his Will, dated the 19th of *January* 1700, devifes all his Eftate to Sir *William Maffingberd* and *Dymoke Walpole*, and their Heirs, in Truft to fell the fame, or fo much as would be fufficient to pay his Debts and Legacies; and after Payment thereof, directed his faid Truftees to convey the Refidue of his Eftate to his Coufin *Robert Barkham*, and the Heirs Males of his Body; and for want of fuch Heirs Males, to the Heirs Males of the Body of Sir *Robert Barkham*, his Great Grandfather; and for want of fuch Heirs Male, to his own Right Heirs for ever; and gave to his Sifter Mrs. *Newcomen* 2000 *l.* to be put out at Intereft by his Truftees during her Life, and after her Death to be paid to her eldeft Son; but if no Son, then 1000 *l.* was to go to her Executors or Adminiftrators; and the other 1000 *l.* to his faid Coufin *Robert Barkham*, or his Heirs Male; and after fome other Legacies, gives all the Refidue of his Perfonal Eftate to his fecond Son *Robert Barkham*, and made him fole Executor; but if it happened that the faid *Robert* was not in *England* at the Time of his Death, then he made the faid Truftees Executors in Truft for him, 'till he fhould return; but in Cafe the faid *Robert* fhould die before he returned, then he made his Heir Male fole Executor, and gave him all his Perfonal Eftate, and foon after died without Iffue. *Robert Barkham* the Coufin, died without Iffue in *Spain* before the Teftator; and now the Queftion arofe upon this Will, Whether *Edward Barkham*, who was Heir Male of the Body of the Great Grandfather, or Mrs *Newcomen*, who was Sifter and Heir of Sir *Edward Barkham* the Teftator,

Testator, and likewise Heir general of the Great Grandfather, had the better Title.

It was argued by Sir *Thomas Powis*, that *Edward* being living, and no Notice taken of him, it was plain the Testator never intended he should have it in the same Manner with his Brother *Robert*; that the 2000 *l.* was only a Recompence for the present Devise of the Estate Tail to *Robert*, and not to be carried as a Recompence throughout to the last Remainder, that that was only to go to those who fully came within that Description, that the Word Heirs, is either to denote the Person who is to take, and then it is *vice Nominis*, or it is to express the Quantity of Estate, that is, to pass, and *Hob.* 31, he that will take as Heir Male by Purchase, must not only be Male, but Heir too; and said, the principal Case of *Cowrnden* and *Clerk*, in *Hob.* and the Case of *Ashenhurst* cited at the End of that Case, were directly in Point; that without all Question it was so in a Limitation by Deeds, and had always been held to be the same in Wills, that in 1 *Co. Archer*'s Case, it was held to be plainly a Contingent Remainder to the next Heir Male of *Robert Archer*, and not such a Description of his Person, as to vest it in him presently, for then it could never have been destroy'd by the Feoffment of the Father, and 2 *Leon.* 70. *Challoner* and *Bowyer* comes up directly to our Case, and shows, that the same Construction has prevailed in a Will, as well as in a Deed; that in the Case of *Burchett* and *Durdant*, 1 *Vent.* 334, if it had not been for the Words *now living*, it would have been a plain Contingent Remainder; and so the Judges in that Case agreed, and cited the Case of *Goodright* and *Cornish*, 4 *Mod.* 255, to the same Purpose; and that in the Case of *Beaumont* and *Long*, the Words begotten were held Equivalent to the Words now living, and amounted to a Description of the Person; that there was a wide Difference between the Words, and for want of such Issue, and the Words for want of his Heirs Male; that in the first Case, the Word Issue was an Explanation and Cor-

 rection

rection of the general Import of the Words Heirs of the Body; but in the last Case the same Words being still used, none could claim, who was not compleatly Heir Male by Purchase; that in this Case he seemed to have done with *Robert*'s Family, when he had limited it him, and the Heirs Male of his Body, and that he intended it should go as the Law directed.

Lechmere, to the same Intent, that the 2000 *l.* given to Mrs. *Newcomen*, could only be a Recompence for the Estate Tail limited to *Robert*; that he only postponed his Heirs for the Sake of *Robert*, and his Issue Male; and whenever they failed, his Heirs must come in; that indeed of late Days, Limitations of this Kind have been carried much farther than in ancient Times, but he thought they ought not to be carried any farther; for that would shake a great many Settlements, and destroy the Peace and Quiet of many Families; that the Case of *Burchett* and *Durdant*, was the first Case that made any Alteration in the Construction of Devises of this Kind, and said in *Mandivill*'s Case, *Co. Litt.* 26 *b.* it was held quite otherwise; that there was a great deal of Difference between a linial Heir Male, and a collateral Heir Male; and that no Case had been carried so far as to let in a collateral Heir Male, unless he was compleatly such; that in the Case of *Burchett* and *Durdant*, the whole Stress and Foundation of the Resolution, went upon the Words, *now living*, which they held to amount to the same as *Heir Apparent*; and yet that Case was strongly opposed, and underwent a very great Litigation; that in the Case of *Beaumond* and *Long*, the Words *then begotten* were held of the same Force, as the Words *now living* were in the other Case; and that Case went on, *and for want of such Issue*, which were plainly explanatory, and shewed, that the Word Heirs was meant the Issue of his Aunt *Long*; but here it is, *and for want of such Heirs Male*, which still preserves the Notion of a legal Heir; and then to take by Purchase, he must be both Heir and Male, which in this Case he is not; that the

Case of *Cownden* and *Clerk* had been always cited on these Occasions, and was never yet denied to be Law; that my Lord *Hobart* in that Case was clear of Opinion, that the Statute *de donis*, was only to preserve the Descent to the Heirs Male of the Body, not to direct their taking by way of Purchase. That in *Co. Lit.* 26 *b.* 164 *a.* if a Man has a Son and a Daughter, and the Lands are given to the Daughter, and the Heirs Males of the Body of the Father, and the Heirs Females of the Body of the Father, she takes only an Estate for Life, and the other Limitation is void, because she ought to be both Heir and Female to take by Purchase, which in that Case she is not, the Brother being Heir.

On the other Side it was argued by Sir *Joseph Jekyll*, that there could be no sound Reason assigned for the Difference between the Heir Male taking by Descent, and when he was to take by Purchase; that at Common Law, before the Statute *de donis*, such Limitations were taken Notice of, and allowed to be good; that in a Will, the Intent of the Testator, who was supposed to be *inceps Concillii*, was always to be regarded; that in the Case of *Pybus* and *Mitford*, my Lord *Hale* was of Opinion, that if the Heir Male, by the second *Venter* could not have taken by Descent, that he might take by Purchase; that the Case of *Beaumont* and *Long* was a Case in Point for them, tho' indeed this was a much stronger Case; for there the Personal Legacies given to the Heirs at Law, were given but once; but here the 2000 *l.* is limited to the Heir, so as in some Sort to resemble Land, for it was to go to her eldest Son, if any; and if not, then to her Executors, *&c.* that there was no Difference between the Limitation for want of such Issue, and for want of such Heirs, that in neither Case could it be carried further than the Words of Limitation imported, and so it was held in *Dyer* 171. *Frensham's* Case, that the Words then begotten in *Beaumont's* Case, would be of no Weight to direct that Resolution, for my Lord

Coke

Coke tells us, in his first Institute 120, *Procreatis* and *Procreandis* are the same.

Attorney-General, to the same Intent, that if this had been an Estate Tail in Sir *Robert* the Great Grandfather, there could have been no Doubt the Defendant would have taken as Heir Male of his Body; that in this Case the Intent of the Testator was plain to exclude his Heir General, that he had sufficiently provided for her, by giving her 2000 *l.* that the Meaning of the Books, which say, the Word Heir is not a good Name of Purchase is no more, than that it is not a sufficient Description of the Person who is to take; but if by any Circumstances he is so described as to notify who is meant, then it is a sufficient Name of Purchase; and so is the Opinion of my Lord *Anderson*, in his Report of *Shelly*'s Case; that the Limitation to the Heirs Male of the Body of one who was dead, was *quasi* an Estate Tail in the dead Person; that taking of it in that Sense, would reconcile all the Differences, and answer all the Difficulties that had been objected against it; and that it was to be taken in this Sense, he cited 2 *Leon.* 23, 27. *Cro. Eliz.* 108-9. *Lit. Sect.* 30. *Cro. Car.* 24. *Hodgkinson* and *Wood*, 1 *Mod.* 226, and 2 *Mod.* 207, the Case of *Southcote* and *Stowell*, that this differed from the Case of *Cownden* and *Clerk*, for the Heirs Male were not limited or mentioned to be of his Body, as in this Case, and said, the Case 16 *Eliz.* at the End of *Pybus* and *Mitford*, 12 *Vent.* was a Case in Point for them.

Mr. *Cowper* to the same Intent, he thought the Distinction taken by Mr. *Attorney-General* would reconcile all Differences, and destroy all the Fictions of the Law against them, that it would take away all Uncertainty in the Description of the Person, and carry on the Descent as the Testator intended it; that if this Notion of its being an Estate Tail in the Great Grandfather, were but a Fiction, yet it might well be made Use of to destroy another Fiction, which excluded the Heir Male from taking.

Sir *Robert Raymond* to the ſame Intent, that generally ſpeaking a Limitation to the Heirs Males, or Heirs Females of ſuch a one will carry it only to thoſe who are compleatly ſuch; but where there are any Words that will amount to a Deſcription of the Perſon, ſo as to ſhew whom he meant by thoſe Words, there it will be ſufficient, tho' he be not Heir Male, or Female, in a ſtrict legal Conſtruction, eſpecially where the Heirs General are excluded, as in this Caſe. As to the Objection, that the 2000 *l.* was a Recompence only for the Loſs of the firſt Eſtate Tail, he ſaid, it muſt be taken as a Recompence for the Whole; for the Defendant *Newcomen* could no more take under the Limitation to the Heirs Male of the Body of the Great Grandfather, than he could under the firſt Limitation to *Robert* in Tail; and therefore the Recompence muſt be ſuppoſed to extend to the Whole, and cited a Caſe of *Baker* and *Wall*, in *C. B. Paſch.* 4. *W. Rot.* 1484, that a Perſon may take as Special Heir where the Intent is manifeſt to exclude the Heir General.

Mr. *Vernon* to the ſame Intent, that the Will of the Teſtator was to be obſerved as far as it might be; that it was here in the Caſe of a Truſt which this Court had the Direction of; that they had ſometimes varied from the Rules of Law; and when they had ſo done, the Courts of Law, from the Inconveniencies that would otherwiſe follow, had come into the Rules of the Courts of Equity, as in the Settlements of Terms for Years beyond a Perſon's Life, and ſo they might in this Caſe.

Mr. *Williams* on the ſame Side put this Caſe, If a Man has Iſſue two Sons, *A.* and *B.* and *A.* has Iſſue a Daughter, and the Grandfather deviſes a Rent Charge out of his Eſtate to the Daughter of *A.* and then deviſes the Eſtate to his Heir Male; no Doubt the ſecond Son ſhall take, tho' the Daughter is Heir, and ſaid, they came into this Court only to know how the Eſtate ſhould be ſettled.

Lechmere by way of Reply ſaid, that the Notion advanced by Mr. *Attorney-General*, that the Heir Male of

the Body of the Great Grandfather ſhould be in, *quaſi* by Deſcent from him, was entirely new, and was attended with very great Inconveniences; for then laying *Edward Barkham* quite out of the Caſe, ſuppoſe the Siſter had been dead, leaving a Son, he would be compleatly Heir and Male too, and yet he could never take, becauſe derived through a Female; and if *Edward Barkham* was to bring a *Formedon* in this Caſe, he could not lay the *Eſplees* in his Great Grandfather, and cited *Litt. Sect.* 30, and my Lord *Coke*'s Opinion thereon, and the Caſe of *Mandeville* there cited.

Lord *Chancellor.* This Will is perfectly Executory, a Conveyance is ſtill to be made, and they come into this Court to direct the Manner of it; ſuppoſe *Edward* had been Heir and Heir Male of the Body of the Great Grandfather, the Conveyance could never be made in the very Words of the Will, for then he could not take at all; it's like the Caſe of Marriage Articles for Settlement of an Eſtate on the Huſband, and Heirs Male of his Body; yet when they come into this Court for a Specifick Execution, the Court models the Settlement, ſo as to make it effectual, and will give the Huſband but an Eſtate for Life. The Special Heir Male in this Caſe was certainly within the Teſtator's Intention to take; but as it had been ſo ſolemnly argued, he would take Time to look into the Books before he would give his Opinion; but ſaid, he was ſtrongly of Opinion for *Edward* the Special Heir Male, and thought that the Settlement ought to be made to him, and the Heirs Male of the Body of the Great Grandfather.

Vid. Poſtea.

Lord *Pawlet* versus *Parry*. Case 287.

A Man makes his Will in the following Manner: As to the Dispofal of my Worldly Eftate, I give and devife, &c. and then gives his Lands to his eldeft Son in Tail, Remainder to his three other Sons in Tail, and devifes Copper Mines and other Eftates to his eldeft Son, to be fold for Payment of his Debts, and gives his Daughter 1500 *l.* there not being Perfonal Eftate fufficient to pay this Legacy, whether Real Eftate, by the Words of this Will fhall be charged therewith

THE Defendant's Father, by his Will, in 1702, devifes as follows: As to the Difpofal of my Eftate, I give and devife the fame as followeth; and then he devifes feveral Lands of about 400 *l.* *per Ann.* being the Bulk of his Eftate, to his Son *Charles* the Defendant, who was his Heir, and to the Heirs Male of his Body; and for want of fuch Iffue, to three other of his Sons in Tail Male fucceffively, with Remainder to his own Right Heirs, then he gives fome Copper Mines, and other Eftates, to his Son *Charles* in Truft, to be fold for the Payment of his Debts; and after, gives to his Daughter (with whom the Plaintiff had intermarried) 30 *l.* a Year 'till fhe fhould attain her Age of 12 Years, and after 50 *l.* a Year 'till fhe fhould be married, and gives her 1500 *l.* Marriage Portion to be paid her by his faid Son *Charles*, within three Months after fuch Marriage, makes his Son *Charles* Executor, and dies; and this Bill was now brought to fubject the Real Eftate in the Hands of the Defendant *Charles*, to the Payment of this Legacy; it was agreed, that there was no exprefs Claufe in the Will to that Purpofe.

It was argued, that there Words tantamount, that he begins with the Difpofal of his Eftate, which muft be intended all his Eftate, as well Real as Perfonal; that the Word Eftate more properly denoted his Real Eftate than his Perfonal; that this Legacy was exprefly devifed to be paid by his Son *Charles*, who had both his Real and Perfonal Eftate; and therefore, in defect of one, the other muft ftand charged in his Hands to make it up; that it was in Behalf of a Daughter, who would otherwife be unprovided for; and tho' the Eftate was devifed to his Son *Charles* in Tail, yet that could make no Difference, for it was a Charge that run along with the Eftate, and bound it in whofe Hands foever it came; and they cited

cited a Cafe between *Glentley* and *Pelham* the 19th of *December* 1686, and a Cafe of *Sherwood* and *Sherwood* at the *Rolls*.

On the other Side it was argued, that here was no Intent to Charge this Eftate with the Payment of this 1500 *l.* that if it fhould be fo taken, the Devife to his Son *Charles* in Tail, muft be fole, for he muft fuffer a Common Recovery, and make himfelf Tenant in Fee, in Order to raife it; that this would entirely deftroy all the Remainders to his other Sons, and fo fruftrate the Devife to them, which he could never be fuppofed to intend by this Devife of 1500 *l.* to his Daughter, being all in the fame Will; that the Cafes wherein fuch Charge had been allowed on Lands, were where the Charge was exprefly mentioned in the fame Claufe, as a Devife to his Son in Tail, defiring him, or to the Intent, that he fhould pay his Legacies; that it could not be pretended thofe Lands were charged to the Payment of his Debts, for he had made an exprefs Provifion for them out of another Part of his Eftate; that if he had intended to have charged his Lands with this Legacy, he would have made an exprefs Devife for that Purpofe, and that no Cafe had ever been carried fo far as was now contended for.

My Lord *Chancellor* faid, thofe laft Arguments were of much more Weight with him, than what had been offered on the other Side; that he fhould defire to fee the Precedents in Black and White; that they often came out different from what they were cited; that there was a Sort of Inclination in each Side to make the Precedents generally fpeak for them; that he did not fpeak this by way of Cenfure, but commended it as the beft Means to come at the Juftice of a Caufe, becaufe there were learned Men on the other Side to fet them right; that unlefs the Precedents were very ftrong, he could fee no Reafon to Charge the Lands in this Cafe, and therefore ordered them to be fearched; but in the mean Time fent it to a Mafter to take an Account of the Perfonal Eftate, to fee if on a probable Computation there was fufficient of the

Perfonal

Perſonal Eſtate at the making of the Will to have anſwered the Legacy.

Wainright verſus *Bendlows*.

Caſe 288.

Where the Teſtator makes a particular Proviſion out of his Real Eſtate for the Payment of his Debts, the Perſonal Eſtate ſhall not be liable to them.

A Man by his Will deviſed all his Fee Farm Rents in the County of *Northumberland* to two Truſtees, and their Heirs in Truſt, to ſell for Payment of his Debts, and the Reſidue of the Money ariſing thereby, he deviſes to his two Sons, equally to be divided between them; then he gives ſeveral of his Goods to go along with his Eſtate as *Heir-Looms*, and deviſes all the Reſidue of his Stock, Goods, and Chattels to his Siſter, the Defendant, whom he made ſole Executrix; and this Bill was brought to ſubject the Perſonal Eſtate in the firſt Place to the Payment of Debts in Eaſe and Exoneration of the Real Eſtate deviſed for that Purpoſe.

And it was urged, that this was the conſtant Courſe of this Court, and cited my Lady *Gainsborough*'s Caſe; and a Caſe of *Coſt* and *Moor*, upon the Earl of *Meath*'s Will, and a Caſe of *Chicheſter* verſus *French*.

On the other Side it was argued, that here was an expreſs Fund deviſed for the Payment of his Debts; that there was a great deal of Difference between a bare Charge on his Real Eſtate for Payment of his Debts, as by a Deviſe of a Term thereout for that Purpoſe, and the Caſe in Queſtion; that here he had given his Lands out and out, and had parted with them for ever, ſo that he never intended any of them ſhould remain in his Family; that theſe Lands were now to be looked upon as Money, and conſequently in a Court of Equity were Part of his Perſonal Eſtate, and ſo had been held in *Roper* and *Ratcliff*'s Caſe upon the Popiſh Act of 11 *W.* 3. about two Years ago, and other Caſes, that the Reſidue of his Goods, Chattels, and Stock, muſt be intended the Reſidue of thoſe which were not ſpecifically deviſed as Heir-Looms; and 1 *Lev.* 203, there is an expreſs Difference between a bare Charge on his Real Eſtate, and where it

is devised, as in this Case, to be sold for the Payment of his Debts.

My Lord *Chancellor* was clear of this Opinion, and decreed, that the Personal Estate was not liable to the Debts in this Case.

Case 289.

Sympson versus *Hornsby*.

Vid. ante.

If a Man by Will impowers his Wife to dispose of his Personal Estate with the Consent of the Trustees, the Wife without such Consent cannot by her Will devise it, and therefore the Husband as to that Part is dead Intestate.

MY Lord *Chancellor* having taken Time to consider of this Case, did now deliver his Opinion, by which it appeared, that the Testator by his Codicil had given his Personal Estate to such Uses, as his Wife, with the Consent of his Trustees, should direct; and the Wife had taken upon her to dispose of it by her Will, without any such Consent, which my Lord *Chancellor* said was a void Disposition, and the Testator as to that must be said to die Intestate, *ab initio*, and ordered a Distribution accordingly.

As to the other Points, he was of Opinion, that the Wife took no Estate for Life by Implication, for he had in the foregoing Part of his Will devised several Lands to her for Life, for her Jointure, and in full of all Claims and Demands whatsoever, both in Law and Equity; and when he after Devises, after the Death of his Wife, all his Lands, Tenements, Rents, Reversions, Profits, and Hereditaments whatsoever (not before disposed of) to his Daughter, *&c.* this shall be taken distributively, that is to say, all the Lands which he had before given his Wife, to go to his Daughter after her Death, and all other his Lands, not before devised, to his Daughter immediately; and to make any other Construction on these general Words, would be absurd, when he had before in such full and express Words provided for his Wife besides; that in no Case an Heir at Law is to be disinherited by Implication, unless it be necessary, which in this Case it is not.

And

And as to the other Point he ſaid, he looked into the Books, and found it already ſettled, that *Bridget* dying in the Life-Time of the Teſtator, the Heirs Male of her Body could not take by Purchaſe, for theſe Words were inſerted to expreſs the Quantity of the Eſtate; but if this were perfectly *res integra*, he thought it plainly the Intention of the Teſtator, that *Jane* ſhould not take 'till there was a failure of Iſſue Male of *Bridget*, for ſo he thought the Words, *and for want of ſuch Iſſue* fully imported; but ſince it had been ſo often reſolved otherwiſe, he was now bound by theſe Reſolutions, as it was meerly a Point of Law; but ſince it was ſo, and an Heir at Law diſinherited as to a Moiety, he would decree no Account of the Rents and Profits, there being no Infant in the Caſe, but left them to their Remedy at Law, by Entry and Ejectment, and ſaid, it would be very unequitable to aſſiſt them in this Caſe.

It was afterwards moved for ſome further Directions touching the Diſpoſition of the Surplus of the Perſonal Eſtate, and mentioned the Caſe of *Britton* and *Vachell*, where Mr. *Britton* having ſeveral Children, gave to his eldeſt Son (who had diſobliged him) 10 *s.* and no more, and gave his Executor a Legacy, and made no Diſpoſition of the Surplus; and it was decreed at the *Rolls*, that the eldeſt Son ſhould be let into his Diſtributary Part with the reſt of the Children; but this Decree was revers'd in the Houſe of Lords, upon the expreſs Words of the Will, which excluded the eldeſt Son from any more than his 10 *s.* but the Court ſaid, this was nothing like the preſent Caſe, which depended on other Circumſtances, and accordingly the Decree was ſettled.

DE
Termino S. Hillarii, 1716.
In Curia Cancellariæ.

Case 290.

Lord *Bernard's* Case.

A Court of Equity will not only grant an Injunction to stay Tenant for Life, without Impeachment of Waste, from defacing the Mansion-House; but will likewise oblige him to put it in the same Plight.

LORD *Bernard* was Tenant for Life, without Impeachment of Waste; and this Bill was brought against him by those in Remainder, for an Injunction to stay his committing of Waste, and by the Proofs in the Cause it appeared, that he had almost totally defaced the Mansion-House, by pulling down great Part, and was going on entirely to ruin it; whereupon the Court not only granted an Injunction against him, to stay his committing further Waste; but also ordered a Commission to issue to six Commissioners, whereof he to have Notice, and to appoint three on his Part; or in Default thereof, the six Commissioners to be named *ex parte*, to take a View, and to make a Report of the Waste committed; and that he should be obliged to rebuild, and put it in the same Plight and Condition it was at the Time of his Entry thereon; and it was said, that the like Injunctions had frequently been granted in this Court; and that the Clauses of *without Impeachment of Waste* never were extended to allow the very Destruction of the Estate itself; but only to excuse from Permissive Waste; and therefore such a Clause would

3 not

not give leave to fell and cut down the Trees which were for the Ornament or Shelter of a Houſe, much leſs to deſtroy or demoliſh the Houſe; and ſo it was ruled in my Lord *Nottingham*'s Time, 2 *Chan. Caſes* 32.

Humerſton verſus *Humerſton.*

Caſe 291. 2 Vern. 737 S. C.

A. deviſes Lands to the *Drapers* Company in Truſt, to convey to *B.* for Life, Remainder to his firſt, &c. Sons for their Lives ſucceſſively, and ſo to their Iſſue Male for their Lives only, &c. tho' this be a vain Attempt of a Perpetuity, yet the Truſtees ſhall make as ſtrict a Settlement as may be, making all the Perſons in Being but Tenants for Life; but the Limitation to the Son unborn muſt be in Tail

THERE were ſeveral Queſtions in this Caſe which aroſe upon the Will of one *Matthew Humerſton*, one whereof was concerning his Intention to perpetuate his Name; for which Purpoſe he had given a very conſiderable Eſtate to the *Drapers* Company, and their Succeſſors for ever, upon Truſt to ſettle the ſame on ſuch a one of the Name of *Humerſton*, for his Life, and after his Death, to his firſt Son for Life only; and ſo to the ſecond, and all other his Sons for Life only; and for want of ſuch Iſſue, then to another of the Name of *Humerſton*, for his Life; and ſo to his firſt and other Sons for Life only; and for want of ſuch Iſſue, then to another of the Name of *Humerſton*; and ſo reckoned up about 50 of that Name, to whom he gave only Eſtates for Life, with like Remainders for Life, to the firſt and other Sons of each of them reſpectively, as they ſhould become intitled thereto; and if there were none of that Name to be found in *England*, then the Truſtees and others were to chooſe out the moſt comely young Man they could find in ſuch a Pariſh; and he to take upon him the Name of *Humerſton*, and then the Eſtate to be ſettled on him for Life, with ſeveral Limitations over in the like Manner, without limiting an Eſtate in Tail, or in Fee to any of them, or making any Diſpoſition of the Fee.

But both Court and Council held this to be ſuch an Affectation of a Perpetuity, that nothing was ſaid in ſupport of it, only the Limitations for Life to the ſeveral Perſons *in eſſe* were held good, and a Settlement decreed to be made accordingly, *viz.* to the firſt *Humerſton*

named in the Will for Life, Remainder to Trustees during his Life, to support Contingent Remainders; with Remainder to his first Son, and the Heirs Males of his Body; and so to the second Son in like Manner; and for want of such Issue, to the others in Remainder successively in like Manner; and it was held clearly, that the Words, *and for want of such Issue* in the Will, would not raise an Estate Tail by Implication to the first *Humerston*, who was to take against such express Limitations to him for Life only, 1 *Leon.* 256. *Manning* and *Andrews* was cited.

Case 292. 2 Vern. 740. S. C.

A. directed his Debts and Legacies to be paid out of the Rents of his Real Estate, and that his Executors should receive the Rents until his Nephew comes to the Age of 25 Years, and to pay the Surplus of the Rents to his Nephew at 25, and devises the Residue of his Personal Estate to his Nephew. The Nephew dies an Infant, the Surplus of the Personal Estate not being given to a Stranger, but to the same Person to whom the Lands were given cannot be taken to be exempt from the Debts.

Dolman and *Smith*.

SIR *Thomas Dolman* by Will the 5th of *February* 1710, devises all his Houshold Goods, and Furniture to the Defendant *Sarah Smith*, and 1000 *l.* to the Plaintiff *Dorothy Dolman* his Niece, payable at 25, and likewise 500 *l.* to the Plaintiff *Lewis Dolman*, payable at 25; then he devises all his Manors, Lands, Tenements, and Hereditaments, to Trustees and their Heirs in Trust, for the Payment of his Debts, Legacies, and Funeral, and does by Will expresly Charge them with the Payment thereof; then he directs, that his Trustees shall receive the Rents and Profits of his said Estate, 'till his Nephew *Thomas Humphry Dolman* should attain his Age of 25 Years, and thereout to allow him 30 *l.* *per Ann.* and 20 *l.* *per Ann.* apiece to the Plaintiffs *Lewis* and *Dorothy*, 'till they should all three attain their respective Ages of 25 Years; then he devises the Residue of the Rents and Profits of the said Estate, together with the said Estate, to his said Nephew *Thomas Humphry Dolman* in Tail Male, Remainder to the Plaintiffs *Lewis* and *Dorothy* in Tail Male successively, Remainder in like Manner to three of the Defendants, with Remainder to the Right Heirs of one of them, who was a Stranger, and no Relation to the Family; then he devises several Things to go along with his Estate, as *Heir Looms*; and afterwards devises all

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rest and residue of his Goods, Chattels, and Personal Estate before unbequeathed to his said Nephew *Thomas Humphry Dolman*, and makes the Trustees his Executors, and dies. *Thomas Humphry Dolman* dies about a Year after, without Issue, being then of the Age of nine Years only, the Plaintiff *Mary* his Mother administer'd to him; and the only Question was, Whether the Personal Estate in this Case belonged to the Administratrix of *Thomas Humphry Dolman*, exempt from Debts, Legacies, and Funeral, or if the Personal Estate should be applied, in the first place towards Satisfaction thereof, notwithstanding this express Charge on the Real Estate for Payment thereof; but which Way soever it was taken, it was agreed the Surplus of the Personal Estate should be subject to Distribution, between the Mother and the Plaintiffs *Lewis* and *Dorothy*.

It was urged for the Plaintiffs, that he had in this Case expresly charged his Real Estate with the Payment of his Debts, Legacies, and Funeral; and therefore the Personal Estate ought to be exempt therefrom; that he had specifically devised away a considerable Part of his Personal Estate, and that, without Question, was not Subject thereto, no more, as it was urged, could the Residue in this Case, because the devising of it by such general Words, was only to save the Trouble of enumerating Particulars, which if the Testator had done, that would have made it a Specifick Devise thereof, and consequently as much exempt as the Particulars before devised; that the Devise was of the Residue before unbequeathed, so that every Thing but what was before bequeathed or devised must pass by this Clause, and no Room left to confine it only to the Residue after Debts, *&c.* which, if the Words had been General, might have been supposed the Intent of the Testator.

On the other Side it was urged, that the Personal Estate was the natural Fund for Payment of Debts; that if there was no Clause to exempt it, this Court had always subjected it in the first Place, notwithstanding any

any Devise of the Real Estate for Payment thereof; that the Personal Estate had been made liable in this Court, where the Real Estate had been expresly devised to be sold for the Payment thereof, where the Lands being to be sold out and out, the Testator could not be supposed to have any Regard to his Heir; that the charging his Real Estate in these Cases, was only in aid of his Personal Estate, in Case that should not be sufficient, that the *Heres Factus* as well as the *Heres Natus* had always been allowed the Benefit of the Personal Estate towards Satisfaction of the Debts, in the first Place; that if an Estate descended with an Incumbrance to the Heir, that he should have the Aid of the Personal Estate to disincumber it.

But to this Mr. *Vernon* said, that that could be only where there was an expresс Covenant for Payment of the Money, which descended in Point of Lien along with the Estate; yet by Reason of the Covenant, which was Personal, the Executors should be bound to discharge it out of the Personal Estate, in the first Place; but there was no Pretence in the World, that if a Man purchased an Estate subject to an Incumbrance, that his Heir should have Aid of the Personal Estate to disincumber it.

My Lord *Chancellor*, on the whole Frame of the Will, was of Opinion, that the Personal Estate was to be applied in the first Place, in Ease of the Real Estate: First, Because there was no express Clause to exempt the Personal Estate, and that had been always the Distinction taken in this Court. *2dly*, It appears, that the Heir of this Family was not to have the Real Estate, 'till his Age of 25 Years; nay, not so much as the Rents and Profits, which should actually fall and become due before that Age; that the Testator appeared throughout to carry a very frugal Intention, and therefore would allow his Heir no more than 30 *l.* a Year for his Maintenance, and that too carried beyond the usual Time of his Age of 21 Years, for he was to be trusted with nothing more, even 'till his

Age of 25 Years; and can it then be thought he intended indefinitly to trust him with the Personal Estate without Limitation to any Age, so that he might squander it all away, and waste it as soon as ever he came to it; that both the Real and Personal Estate in this Case were to come into the same Hand; and therefore he could have no such frugal Intention, with Regard to the one, and leave it so loose as to the other; that if the Personal Estate had been devised to a Stranger, it might have had another Consideration from the Meaning of the Words *before unbequeathed*; but here he thought it could not, and accordingly decreed the Personal Estate to be subject, in the first Place, to the Debts and Legacies.

Onyons versus *Tryers*.

Case 29[illegible]. 2 Vern. [illegible]41 S. C.

One devises his Land by Will, attested by three Witnesses, and afterwards makes another Will of his Land, which Revokes all former Wills; but this Will is not duly executed; the last Will being no Will, and void, will not amount to a Revocation of the former.

A Man makes his Will, duly executed and attested according to the Statute of *Frauds* and *Perjuries*; and at the same Time, in like Manner, executes a Duplicate thereof; some Time after, the Testator having a Mind to Change one of his Trustees, orders his Will to be wrote over again, without any Variation whatsoever from the first, save only in the Name of that Trustee, and when it was so wrote over, he executes it in the Presence of three Witnesses, and the three Witnesses subscribed their Names, but not in his Presence; after this, the Testator cancels the Duplicate by tearing off the Seal, and then dies, and the Question now was, Whether this second Will not being good as a Will to pass Lands, should yet be a Revocation of the first? And if it should not, Whether the cancelling of the other should be a Revocation thereof, within the Statute of *Frauds* and *Perjuries*.

And it was decreed, that neither the making of the second, nor the canceling of the first was a Revocation thereof, tho' in the second there was an express Clause, that he did thereby revoke all former and other Wills.

Wherein my Lord *Chancellor* took this Diſtinction, that the ſecond was not intended as an effectual Will to paſs the Lands to the Perſons, and in the Manner thereby deviſed, and therefore if it was not good as a Will. to that Purpoſe, it was no Revocation of the firſt; and if a Man by his Will deviſes Lands to *A.* and after makes a ſecond Will, and thereby deviſes the ſame Lands to *B.* if this ſecond Will be not good as a Will to paſs the Lands to *B.* it ſhall be no Revocation of the Deviſe in the firſt to *A.* for it is plain, *A.* was to loſe only what *B.* was to gain, and if *B.* gains nothing by the ſecond, *A.* ſhall loſe nothing that was given by the firſt; but if a Man executes a ſecond Will, which appears to have no other Intention than only to revoke his firſt, and to die Inteſtate; tho' his ſecond be not in all Circumſtances duly executed as a Will whereby to paſs Lands, yet it will operate as a Revocation of the firſt.

And as to the cancelling or tearing of the firſt Will, that is no Revocation of it in this Caſe, becauſe that was no ſelf-ſubſiſting independent Act, but done to accompany or in Way of Affirmation of the ſecond, it was done from an Opinion, that the ſecond had effectually revoked the firſt, and therefore he tears the firſt as of no Uſe; but if the firſt was not effectually revoked by the ſecond, that Act of tearing the firſt will not deſtroy it neither, for though a Man may by the Statute of Frauds as effectually deſtroy his Will by tearing or cancelling it, as by making a ſecond, when he intends that as a Revocation of the firſt; yet if it be inſufficient for that Purpoſe, as in the principal Caſe, the tearing and cancelling of the firſt being only in Conſequence of his Opinion, that he made good the ſecond Will, ſhall not deſtroy the firſt, but it ought to be ſet up again in this Court; and he ſaid he thought this was conſiſtent with the Reſolutions that had been given in 3 *Mod.* 258. 1 *Shower* 89. *Eggleſton* and *Speak*, and a Caſe cited by Serjeant *Hooper* in *C. B.* where a Man by Will gave

Lands to *A.* for Life, Remainder to *B.* in Fee; and after, by a second Will, executed in the Presence of three Witnesses, but not signed by the Witnesses in the Testator's Presence, he gave the same Lands to *A* again for Life, Remainder to *C.* in Fee, this was held no Revocation of the Remainder to *B.* notwithstanding an express Clause of revoking all former Wills, and it was held clearly, that the cancelling or revoking either of the Duplicate or Original Will, is an effectual avoiding of both, they being both but one Will, and therefore must stand or fall together.

Brown and *Barkham.*

Case 294. Ante 285.

A. devises Lands in Trust after Debts paid, to convey the Premisses to the Heirs Male of the Body of *B.* the Testator's Great Grandfather, *C.* is the Heir Male of the Body of *B.* but not Heir General, there being a Daughter or an elder Brother, who is Heir General; yet the Trustees shall convey to *C.* as *C.* would be well intitled to take as Heir Male by Descent, so is he sufficiently described to take by Purchase.

MY Lord *Chancellor* having taken Time to consider of this Case, did now deliver his Opinion to the following Effect; he put the Case at large, and then promised, that naturally and according to the common unprejudiced Reason of Mankind, every one at first reading of this Will, would be clear of Opinion, that the Testator's Intent in this Case was to give his Estate to his Heir Male, and none but a Lawyer, or one whose Judgment is biassed with the Learning of the Law could possibly understand it otherwise; but since Resolutions of Law, and Decrees of Equity have from Time to Time established certain Rules and artificial Modes of Property, he thought it necessary to consider such of them as had been cited and made Use of to disprove this natural Construction of the Will, before he gave his own Judgment.

The first that has been cited is, that he who takes as Heir, or Heir Male, cannot take whilst his Ancestor is living; for the Rule is, that *non est Heres viventes*, and this is *Archer*'s Case, 1 *Co.* 66. but that Rule makes nothing in the present Case. First, Because here the Ancestor was actually dead at the Time that this Devise took Place. 2*dly*, Because here the Words of the Devise are all

all ſtrictly and literally verified of the Perſon that is to take as Heir Male, when the Deviſe took Place; and therefore nothing can be inferred from that Rule to influence the preſent Caſe; for in *Archer*'s Caſe, the Words were not all true of him who was to take as Heir Male, for his Anceſtor was living at the Time when the Will took Effect; and therefore according to the Rule aforementioned, he could not take as Heir Male; but in our Caſe, the Anceſtor being dead, even long before the making of the Will, the Defendant *Barkham* may truly and literally be called his Heir Male, and conſequently capable of taking by that Name, if nothing elſe hinders.

Another Caſe that has been cited, is the Caſe of *Challoner* and *Bowyer*, 2 *Leon.* 70; but that likewiſe is nothing to this Purpoſe, becauſe there the eldeſt Son was living, when the Remainder ſhould have veſted in the Heir of his Body, which it could not do during his Father's Life; for during his Life, he was no more Heir Male, than he was Heir Female, ſo neither is the Caſe in *Dyer* 99 *a.* of any force at all in the preſent Queſtion, for there the Son who claimed the Remainder was to make himſelf Right Heir, both of the Body of his Father and Mother, which during his Father's Life he could not do; but in that Caſe it is ſtrongly implied, that if the Father had been dead, the Son ſhould have taken as Right Heir of their two Bodies.

A ſecond Objection has been made, that he who takes as a Purchaſor by the Name of Heir Male, muſt anſwer the whole Deſcription, that is, he muſt be both Male and Heir, which the Defendant *Barkham* is not; but this is a Rule which has no Foundation in natural Reaſon, but is raiſed and ſupported purely by the artificial Reaſoning of Lawyers; and under this Head we may conſider the principal Caſe of *Cownden* and *Clerk*, in *Hob.* and *Aſhurhurſt*'s Caſe, cited at the End of that Caſe, and alſo the Caſe of *Sterling* and *Ettrick* in this Court, in all which Caſes it is obſervable, 1*ſt*, That the Limitations

were only to the Heirs Male, not ſaying of the Body. 2*dly*, Whoever carefully obſerves the Manner of my Lord *Hobart*'s Argument, *Fol.* 32, will find his own Opinion to have been for the Deviſe, if it had been made to the Heirs Male of the Body, and there ſeems to have ſome Miſtake crept into the Print, in the tranſcribing that Part of the Caſe, which looks otherwiſe; and as to the Caſe of *Sterling* and *Etterick*, beſides, that there is no Mention of the Word Body, that was in the Caſe of a Deed directing a Conveyance to his Heir Male, and therefore he thought the Decree in that Caſe extreamly Right, and ſhould have given the ſame if it had come before him.

But now none of all theſe Caſes do in any Sort affect the preſent Caſe; for if the Reaſon of rejecting thoſe Deviſes were good, becauſe both Parts of the Deſcription of the Perſon intended to take were not true, the ſame will be a good Reaſon for allowing the Deviſe in the preſent Caſe, where the whole Deſcription is literally and ſtrictly true; for without Queſtion one may take as Heir Male of the Body of a Perſon deceaſed, who is not Heir General of the ſame Perſon.

Firſt, Becauſe the Intent of the Teſtator is manifeſt, and appears at firſt View, who was the Perſon meant to take thereby. 2*dly*, The Diſtinction between taking by Purchaſe, and taking by Deſcent, where the Words are the ſame, tho' it be mentioned in Books of good Authority, yet it ſeems to have no ſufficient Foundation of Reaſon or Authority of Law to ſupport it; and if it ſhould prevail in all Caſes, would overthrow another Rule as certain, and well eſtabliſhed, which is, that a Perſon may take by Purchaſe, if he be ſufficiently deſcribed; tho' he has neither Addition of Chriſtian, or Sirname given him; nay, tho' his Chriſtian Name be falſe or miſtaken, as appears by ſeveral Caſes put to this Purpoſe in *Co. Lit.* 3. *a*; and if ſo, then certainly ſuch a Deſcription of the Perſon as has all the Marks and Characters whereby he may be known, and is defective in none,

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muſt be ſufficient to intitle him under that Deſcription, and that is the preſent Caſe, for the Words here are all true.

2*dly*, They are no more than is true, for *Edward Barkham* in the ſtricteſt Propriety of Speech, is Heir Male of the Body of his Great Grandfather, and the Books which are to the contrary infer to make out their Concluſion that the Words are not true (which ſhows, that if they are, the Authority of thoſe Books muſt fail) and that they are not true, they endeavour to prove by urging, that the Perſon who is to take by ſuch a Deſcription, muſt be both Heir Male, and Heir General, for if he fails in either, he is not the Perſon deſcribed; but this ſurely is no good Reaſon, for though it be true, that the Word *Heir* taken ſingly by itſelf, can be true of none, but him who is Heir General; yet when it is joined with the Words *Male* or *Female* of the Body, they are true of him, or her, who deſcends from that Body, tho' they are not Heirs General, and to ſay otherwiſe, is a very diſingenuous and unfair Way of conſtruing Words; for ſuppoſe a Man has Lands at Common Law, and other Lands in *Borough Engliſh*; or ſuppoſe a Man has Lands at Common Law, and other Lands in *Gavelkind*; and he deviſes his Lands at Common Law to his Heirs in *Gavelkind*; in theſe Caſes, if a Man ſtops at the Word *Heir*, or *Heirs*, it is certain the youngeſt Son in the one Caſe, or all the Sons in the other cannot take, becauſe the eldeſt Son only is Heir; and therefore this can never be a juſt Conſtruction of ſuch a Will; but now take all the Words together, and 'tis then moſt certainly a good Deviſe to the youngeſt Son, who is Heir in *Borough Engliſh* in the one Caſe, and to all the Sons who are Heirs in *Gavelkind* in the other, ſo in the principal Caſe, leave out the Words *Males of the Body*, and then no Doubt none but the Heir General can take; but as theſe Words were added, to diſtinguiſh him from the Heir General, it would be a very unjuſt Way of wreſting and perverting a Man's Words to leave them out, purely

to let in another whom the Teſtator never intended ſhould take; and tho' the Addition of thoſe Words was purely to diſtinguiſh him from the Heir General, from whom theſe very Words were added to diſtinguiſh the Perſon deſcribed to take, which is all one as to ſay, that though the Law allows an Heir General, or Heir Special, two diſtinct Perſons; yet none can take who is not both Heir General, and Heir Special in one Perſon, which is to confound and deſtroy the very Diſtinction itſelf.

Beſides, here the Perſon intended to take is certain and known, *Edward Barkham*, and no other, is Heir Male of the Body of his Great Grandfather, and the Deſcription of him by theſe Words, is correct and perfect.

3*dly*, If the Words Heirs Males of the Body in the plural Number, are a ſufficient Deſcription to convey Lands by Deſcent from the Anceſtor, to the Heir Male of his Body, they are as ſufficient to paſs ſuch Lands to the ſame Heir Male of that Body by Purchaſe, where the Intent of the Teſtator appears to be ſo; and this is not a Conſtruction wrought upon the Statute *de donis*, for that Statute does not determine or meddle with what Words are Words of Purchaſe, and what not, or how the Heir of the Body that is to take ſhall be deſcribed, nor is there any ſuch Diſtinction between a Purchaſe and a Deſcent ariſing upon that Statute; for the Words here made Uſe of in this Deviſe were all at the Common Law long before the Statute *de donis*, which did not create ſuch Heir Male of the Body, for he would have taken by ſuch a Deviſe at the Common Law, as ſufficiently deſcribed and known, and the Statute only confirms the Deſcription; and this he ſaid was the principal Reaſon of the Opinion he was now to deliver, and the Authorities which have been cited to the contrary do not at all come up to this Caſe, there being no Mention of the Word *Body* in any one of them; and as to the Opinion of *Hob.* 32. that the Words Heirs Males of the Body are not ſufficient Words of Purchaſe, where another is Heir General, he ſaid,

1*ſt*,

1*st*, That that Point was not at all neceſſary for the Determination of the principal Caſe there. 2*dly*, From ſome Expreſſions in that Book, it looks rather like a Miſtake in the Tranſcriber, than *Hobart*'s own Opinion. 3*dly*, If it were his Opinion, it ſeems not to be Law, becauſe a Limitation to the Heirs Males of the Body of a Perſon dead before, was ſufficient to veſt in them by Purchaſe within the Statute, and before the Statute *de donis*; and ſo is *John de Mandevill*'s Caſe, *Co. Lit.* 36, which he cited and applied, and ſaid, that the ſole Difference in thoſe Caſes was, between a Deviſe to the Heirs Males, or Heirs Females generally; and ſuch a Deviſe to the Heirs Males, or Heirs Females of the Body; and as to *Shelley*'s Caſe, 1 *Co.* tho' the principal Caſe there, was rather a Confirmation of this Opinion; for there the Anceſtor was dead at the Time the Limitation took Place; and for my Lord *Coke*'s Report of that Caſe, it appears to be only his own Argument, as he was of Council in it; and tho' he does indeed lay down the Diſtinction between taking by Purchaſe, and taking by Deſcent; yet *Wray* Chief Juſtice, when he comes to ſum up the Reaſons of the Judgment, he takes no Manner of Notice of that Diſtinction; ſo that it ſeems only to be my Lord *Coke*'s own Opinion, without any Authority to ſupport it; but then indeed this Doctrine is again tranſcribed into his firſt *Inſtitute* 24, and *Shelley*'s Caſe cited for it, which is the only Authority to warrant that Diſtinction; for as to the Year Books referred to in the Margin; he ſaid, he had looked into every one of them, with all the Care he could, that he might go to the Bottom of this Queſtion; and thoſe Books are ſo far from warranting ſuch an Opinion, that there is but one of them at all to the Purpoſe, and that is directly contrary to what it is cited to prove, for as to the 9 *H.* 6. 23, 24, and 11 *H.* 6. 12, it was a Limitation only to the Heirs Males, not Heirs Males of the Body; beſides, that he was not in *Eſſe* when the Limitation to him was to take Place;

and therefore, that Case can be no Ground for my Lord *Coke*'s Opinion.

Another Case cited to support this Opinion is the 37 *H.* 8. *Brok.* Tit. *de donis*, Sect. 61. but on looking into that Case, it appears to be nothing at all to the Purpose, and *Bro.* Tit. *Mosme* 1, 40, *Husseys* Case there is no judicial Resolution on this Point one Way or other, and *Dyer* 347, is only an imperfect Report of *Shelley*'s Case, and from the Weakness of these Authorities to prove the Doctrine continued, for he took Occasion to observe, that there was no relying on sudden Opinions, as cited in Books.

And for the Support of his own Opinion, he cited *Pollex.* 454, and 2 *Ven.* 311, *Burchett* and *Durdant* al' *James* and *Richardson*, which he said, was a much stronger Case than this now in Question, for there the Ancestor was living, and yet it was held to be such a Description of him, as to let him in during the Life of his Ancestor, tho' that was a Dispension with the ancient Maxim of Law, *quod non est Heres Viventis*; but in our Case no Maxim of Law is infringed; but the Case of *Beaumont* and *Long* in the House of Lords lately, is still a much stronger Case; for there was not so much as the Words *of the Body*, yet the Heir was admitted to be sufficiently described to take, even in the Life of his Aunt *Long*, so that he thought the Obiter Opinions of my Lord *Coke* and *Hobart*, to be very much out weighed by the Authority of those Resolutions.

Then he cited the Case of *Pibus* and *Mitford*, 1 *Vent.* 372, and said, that my Lord *Hales* did not think fit to rely on the common Point of the Father's taking an Estate for Life, by Implication; but held the Words *Heirs Males of the Body of his second Wife* a sufficient Description, to vest it in the Heirs Males of the Body of such Wife by Purchase; and tho' the Reporter of that Case introduces the Argument of my Lord *Hales*, only with his saying that, *of that he was not well satisfied*, yet in the Argument of my Lord *Hales*, after he seems

to have profeſſedly ſet about confuting that Opinion, and takes Notice of ſuch Heir Male as a ſpecial Heir at Common Law, before the Statute *de donis*, who was capable of taking diſtinct from the Heir General, and what he cites there out of *Lit. Sect.* 352, of performing the Condition as near the Intent as may be, proves in the preſent Caſe, that the Settlement muſt be made to the Perſon who is the Heir Special, and ſaid, he had never met with any one Caſe to the contrary; but only the Opinions before mentioned of *Coke* and *Hobart*; for the Caſe at the End of *Pybus* and *Mitford*, is directly in Point for the ſpecial Heir Male, and in that Caſe he took Notice of his Heir General, as he does in the preſent Caſe; and therefore could never mean, that his Heir Female ſhould take it, when he expreſly gives it to his Heir Male, and in that Caſe Juſtice *Wyld* was of the ſame Opinion in that particular, ſo that it has the Authority of two Judges there, and the Reaſoning of my Lord *Hales* there, muſt ſurely convince all that heard it, and is much ſtronger than the before mentioned Opinions of *Coke* and *Hobart*, the laſt whereof amounts to no more than that he doubted of the Law in this Point.

Then he cited the Caſe of *Baker* and *Wall*, *Trin.* 8 *W. Rot.* 1484, in *C. B.* where a Man made his Will in this Manner, *I give to my eldeſt Heir Male, and his Heir Males for ever, all my Lands, in ſuch a Place, and if there be a Female, ſhe to have* 12 l. per Ann. *as long as ſhe lives*; and the Teſtator having two Sons, the eldeſt which was dead in his Life Time, leaving a Daughter, who was Heir General, yet the youngeſt Son went away with the Land; and that Caſe, as appears by the Adjournments on the *Rolls* was depending for a conſiderable Time, ſo that ſeems to have been ſettled with great Judgment and Deliberation; and in that Caſe there were ſeveral Expreſſions to ſhow he never meant, that his Heir General ſhould take.

As to the Caſe of *Goodwright* and *Corniſh*, which has been cited, he ſaid, it was nothing at all to the Purpoſe, and therefore he took Notice of it laſt of all.

And upon the whole concluded, that the Words of this Will were ſufficient to veſt the Eſtate in Queſtion in the Heirs Male of the Body of the Great Grandfather, *1ſt*, Becauſe natural Reaſon, common Senſe, and the Intent of the Teſtator call aloud for it. *2dly*, Becauſe the Arguments to the contrary, are now brought into a very narrow Compaſs and Weight. *3dly*, That the Weight of them, if any, was over-weighed by judicial Reſolutions in much ſtronger Caſes; and therefore the only Doubt now remaining was, how this Truſt was to be executed; in conſidering whereof, he ſaid, that the Limitation to the Heirs Males in the Plural Number, made no Manner of Difficulty, for ſo was *Shelley*'s Caſe; and when a Conveyance comes to be made, it muſt be to the Perſon who is Heir Male in the Singular Number, and the Words are better and more ſkilfull in the Plural Number, than they would have been, if they had only been in the Singular, as they both denote the Perſon who is to take, and do at the ſame Time deſcribe the Quantity of Eſtate he is to take.

And thereupon decreed, that the Truſtees ſhould execute a Conveyance to *Edward Barkham*, and the Heirs Male of the Body of his Great Grandfather, for in this Caſe, *Equitas ſequitur Legem*, and the Conveyance muſt be as near the Intent of the Teſtator as may be, according to the before mentioned Rule of *Lit. Sect.* 352, and a Conveyance was decreed accordingly.

DE
Termino Paſchæ,
1717.
In Curia Cancellariæ.

Caſe 295.

Northey verſus *Burbage.*

By a Deviſe to Children and Grandchildren none can take, but thoſe who are in *Eſſe* at the Time of the making of the Will, unleſs there are future Words which ſhow the Teſtator's Intent.

IN this Caſe it was ſaid by the Council, and agreed to by the Court, that a Deviſe to all his Children and Grandchildren extends only to thoſe who were in *Eſſe*, at the Time when the Will was made; for then the Will ſpeaks, and none born after are to be let in, unleſs there had been future Words in the Will, to all his Children or Grandchildren, which ſhould be born, or be living at his Death.

A Grandchild of a Freeman of *London* cannot come in for a Share by the Cuſtom.

2*dly*, That a Grandchild is not within the Cuſtom of *London* to come in for his Father or Mother's Share, together with the other Children of a Freeman; and this has been ſettled by the preſent Lord *Chancellor*, where a Deed, by Way of Proviſion for a Grandchild being made by the Grandfather, after the Father's Death, in order to introduce him into his Father's Place, was ſet aſide, as made in Fraud of the Cuſtom againſt the ſurviving Children.

Tho' a Freeman of *London* by Will declares, that he had given ſome of his Children 1000 *l.* apiece in full of their Orphanage Part; yet this very Declaration, upon bringing the Advancement into *Hotchpot*, intitles them to their full Cuſtomary Share: but whether Proof will be admitted to ſhow, that the Advancement was more than declared by the Father, *Q.*

3*dly*, The Teſtator in the principal Caſe being a Freeman of *London*, by his Will in Writing declared, that he

he had given 1000 *l.* to one, 1000 *l.* to another, and ſo to others of his Children, in full of their Orphanage Part, by the Cuſtom of *London*; yet this very Declaration let them in, bringing thoſe Sums into *Hotchpot* to their full Cuſtomary Shares of the whole; but whether the Sum mentioned in the Will ſhould be taken to be the whole of what the Teſtator had given them, or if the Parties concerned were at Liberty to prove more paid to them, was the greater Queſtion, and the Court ſeemed inclinable to let them into the Proof thereof.

4thly, A Deviſe of 500 *l.* apiece to two of his Grandchildren by Name; and if either of them died, their Share to go to the Survivor, and if they both died, then their Shares to their Mother; one of them died in the Life Time of the Teſtator, yet his Share went by the expreſs Words of this Will to the other Grandchild, and was held to be no lapſed Legacy.

A. deviſes 500 *l.* apiece to his two Grandchildren by Name; and if either of them die, his Share to go to the Survivor; one of them dies in the Life Time of the Teſtator, his Share ſhall go to the Survivor, and is not a lapſed Legacy.

Piggot verſus *Penrice*. Caſe 296.

THIS was an Appeal from the *Rolls*, and the only two Points in Queſtion were, *1ſt*, Where the Teſtatrix by Will deviſed in this Manner, *I make my Niece* Gore (*ſince married to Sir* Henry Penrice) *Executrix, of all my Goods, Lands, and Chattels,* Whether any, and what Eſtate paſſed in the Lands by this Deviſe? It appearing in the Cauſe, that the Teſtatrix had no Term or Intereſt for Years, in any Lands whatſoever; but an Eſtate of Inheritance in the Lands in Queſtion.

A. deviſes to her Niece in this Manner, *I make my Niece G. Executrix of all my Goods, Lands, and Chattels*, and dies, not having any Leaſehold Intereſt, yet her Lands of Inheritance paſs not by theſe Words.

The ſecond Point was, where the Teſtatrix had made a Settlement, with Power of Revocation by Writing, executed under Hand and Seal, in the Preſence of three Witneſſes, not being menial Servants; and ſome Time after, being indiſpoſed, wrote a Letter, which was proved and read in the Cauſe, ſignifying her Intentions to revoke thoſe Uſes, and deſiring a Deed might be prepared purſuant to her Power for Revocation thereof, and ſettling the

the ſame on her Niece *Gore*, Whether this ſhould amount to a Revocation, ſhe dying before any Deed was prepared, or any Revocation actually made?

As to the firſt Point, it was argued, that this Deviſe was ſufficient to paſs the Lands, and to give the Deviſee an Eſtate of Inheritance therein; that if it were otherwiſe, the Word *Lands* would be uſeleſs, and muſt be rejected, there being no Terms or Intereſts for Years in any other Lands; that if one ſays in his Will, I make ſuch a one Univerſal Heir, that will paſs, not only his Real Eſtate, but his Perſonal Eſtate likewiſe; and this has been oftentimes allowed, and yet theſe Words are as improper, and as little applicable to a Perſonal Eſtate, as the Words in the preſent Caſe are to a Real Eſtate; that by making her Niece Executrix of her Land, ſhe gave her a Power to ſell and diſpoſe of her Lands, and that without Queſtion would have paſſed a Fee; and by this Deviſe the Lands are made Subject to the Payment of Debts, and under the Controul and Management of the Executrix, in the ſame Manner as the Goods and Chattels, whereof ſhe is made Executrix in the ſame Clauſe; and if ſhe ſhould have but an Eſtate for Life therein, ſhe might poſſibly die before ſhe were reimburſed out of the Rents and Profits what ſhe had paid for Debts, which is the Reaſon that a Deviſe to one paying my Debts will paſs a Fee.

As to the ſecond Point, it was argued from ſeveral Expreſſions in the Letter, that ſhe had a manifeſt Intention to revoke the Settlement; that ſhe went as far as ſhe could towards it; that ſhe expreſly gave Directions to have a Deed prepared for that Purpoſe; and that the Reaſon of its being not compleated, was her dying ſo ſoon, which was the Act of God; that if this Letter had been ſealed and atteſted, purſuant to the Power, it would without Queſtion have been a ſufficient Revocation; and they cited the Earl of *Albemarle's* Caſe, where a Power of Revocation was to be in the Preſence of ſix Witneſſes, whereof three to be Peers; yet it was held in

that Caſe, that if the Perſon were beyond Sea, or under any Diſability of having three Peers, and purſued his Power of Revocation in all other Circumſtances, that it would be effectual in a Court of Equity.

But my Lord *Chancellor* was ſo clear of Opinion in both Points againſt them, that he affirmed the Decree, without hearing the Council on the other Side: As to the firſt Point, he ſaid, whatever his private Opinion might be of the Intent of the Teſtatrix, to give her Niece theſe Lands, yet in Point of Judgment, he could not Decree for her; that it was a moſt known and eſtabliſhed Rule of Law, that an Heir is never to be diſinherited, but by expreſs Words, or neceſſary Implication; that here were neither in this Caſe; that the Word *Lands*, was not, however, uſeleſs or to be rejected; for that in all Probability there might be Rents in Arrear of theſe Lands, and by making her Executrix of her Lands, the Rents of thoſe Lands would paſs; that nothing certain could be inferred from ſuch a Deviſe, and therefore he muſt not break into the ſettled Rules of Law to ſupport it.

As to the ſecond Point, there might be good Reaſons for putting herſelf under that Reſtraint, in the Manner of Revocation, to prevent Surprize or Inadvertency; that here was no Pretence of any Obſtruction from the Perſons, who claimed under that Settlement; that here was nothing more than beſpeaking a Revocation, and the Completion of it prevented by her Death; that no Caſe had ever yet gone ſo far, and therefore it was too hard for him, and affirmed the Decree.

Note, The Teſtatrix by Will gave Part of theſe Lands to Charitable Uſes, and they were decreed at the *Rolls* to be good as an Appointment upon the Act of Parliament, notwithſtanding there was no Revocation; but that Point was not now brought in Queſtion.

Hele

Caſe 297.
May 9.

One makes a Settlement with Power by Deed to revoke it, and by the ſame Deed, or any other from Time to Time, to limit new Uſes; he revokes the Settlement, and limits new Uſes; but reſerves no farther Power to himſelf; he cannot by Virtue of the firſt Power limit any other Uſes.

Hele verſus *Bond.*

A. Makes a Settlement, wherein was a Power, that he might from Time to Time, by Deed or Writing under his Hand and Seal, revoke the Uſes thereof, and by the ſame, or any other Deed, limit and declare new Uſes: In Purſuance of this Power, he revokes the old Uſes; and by the ſame Deed limits new Uſes, without annexing any new Power of Revocation to theſe new Uſes afterwards, thinking he had, by Virtue of the firſt Settlement, a Power of Revocation, *toties quoties*, he by another Deed revokes the laſt Uſes, and again declares other Uſes of the ſame Lands; and if he had ſuch Power was the Queſtion.

It was agreed he might, in the Deed of Revocation, have annexed a Power of revoking the Uſes thereby declared, and might afterwards have executed that Power accordingly; but in this Caſe there being no ſuch new Power of Revocation annexed to the new Uſes, it was decreed, that his new Power of Revocation was executed, and at an End; and by Conſequence, that the Revocation afterwards was without any Warrant, and ſo the Uſes limited upon the firſt Revocation, muſt ſtand; and this was this Day affirmed in the Houſe of Peers, and agreed to be intirely a new Caſe, and was very elaborately argued on both Sides.

DE
Termino S. Mich.
1717.
In CURIA CANCELLARIÆ.

Furſaker and *Robinſon*. Caſe. 298.

Equity won't ſupply the want of a Surrender, in Behalf of a Natural Child.

ONE ſeiſed of Lands, which by the Cuſtom of the Manor could only paſs by Deed, Surrender, or Admittance, and having a Natural Daughter, does by Deed, in Conſideration of 300 *l.* therein mentioned to be paid by the ſaid Daughter, grant and convey thoſe Lands, to her and her Heirs, and ſhe was admitted accordingly; but no Surrender was made of theſe Lands, as the Cuſtom required, and at the foot of the Admittance was a Proviſo, That her reputed Father ſhould hold and enjoy thoſe Lands for his Life; and alſo in the Deed was a Covenant for further Aſſurance; but for want of a Surrender, according to the Cuſtom of the Manor, this was agreed to be a defective Conveyance, ſo this Bill was brought againſt the Heir at Law, to ſupply the Defect, and to have further Aſſurance according to the Covenant, and whether this Court could ſupply it in Behalf of a Natural Daughter, was the ſingle Queſtion.

It was urged for the Daughter, that ſhe was to be conſidered as a Purchaſor, having paid 300 *l.* for it; but it was ſaid on the other Side, that tho' the 300 *l.* was mentioned in the Deed to be paid, yet the Plaintiff

could not make any Proof that the Money was paid; it was then further urged for the Plaintiff, that after her Birth, her Father had married her Mother; and therefore, tho' she was a Bastard by our Law, yet by the Law of the Spiritual Court, she was looked upon as a *Mulier Puisne*, tho' before the Marriage, she was *Bastard Eigne*, for that, by their Law, *Matrimonium Subsequens tollit Peccatum Precedens*; but of this Marriage with her Mother, likewise she made no Proof; then it was urged, that she being his Natural Daughter, he was by the Law of Nature obliged to provide for her; and that this Court ought to supply a defective Conveyance intended for that Purpose, as it had done in many Instances for younger Children; and the rather, by Reason of the express Covenant for further Assurance, which they came here to have a Specifick Performance of; and that she ought to be looked upon as a Purchasor, and to have the Benefit of that Covenant.

On the other Side it was argued by Sir *Thomas Powis*, and others, that tho' the reputed Father, if he thought her to be his Child, was by the Law of Nature obliged to provide for her, yet Nobody else was; that this Court was under no such Obligation, that she was to be considered now as a meer Stranger, and to supply a voluntary defective Conveyance for a Stranger, against an Heir at Law, was what was never attempted before; that she was to be considered as *Nullius Filia*, and could not be considered as a Child in any Court; and that this Court was to follow the Law in such Cases; that tho' her Father might have a great Affection for her, yet that was no such Affection as would raise a Use at Law; that the Covenant for further Assurance could not at all help the Case, where the original Conveyance itself was void; that if a Man covenants to stand seised to the Use of a meer Stranger, and covenants to make further Assurance, this Covenant depending on the Nature of the Conveyance, if that be void, the Covenant

which is only auxiliary, and goes along with the Eſtate, muſt be void too; that this was a Copyhold that could not be affected, even by a Judgment at Law, much leſs by a Covenant that would not bind the Heir at Law of the Copyhold; that in the Caſe of *Kettle* and *Thompſon*, in the Time of my Lord *Somers* it was held, that a Man was not obliged to provide for his Grandchildren, as he was for his Children, which were then ſaid to be in the Nature of a Debt upon him; and as he was obliged to pay his Debts, this was a Debt of Nature, which he was likewiſe obliged to pay, but not to his Grandchildren (but my Lord *Chancellor* ſeemed not to be ſatiſfied with the Difference, and ſaid, by the Statute-Law of 43 *Eliz.* a Man was obliged to provide for his Grandchildren) but as to the Caſe in Queſtion, the Court was of the ſame Opinion, for the Reaſons before given, and diſmiſs'd the Appeal from the *Rolls*; and as to the Proviſo, at the Foot of the Admittance, it was held repugnant and void, according to a Caſe *Cro. Car.* or *Cro. Jac.* and the Diſtinction taken in 4 *Co. Kite* and *Quinton.*

Howell and *Price*.

Caſe 299.

The Perſonal Eſtate ſhall be applied in Exoneration of the Real, in Favour as well of an *Heres Factus*, as an Heir at Law. Whether the Executor takes it as Executor, or it be deviſed to him, unleſs there are Words to exempt it.

THIS Cauſe now came on again to be argued, on ſeveral Precedents produced, that the Perſonal Eſtate in the Hands of the Executor, whether it were expreſly deviſed to him, or came to him only by Virtue of his being made Executor, that in both Caſes, unleſs there was an expreſs Clauſe to exempt it, that it ſhould be applied in Eaſe and Exoneration of the Real Eſtate; and that as well in Behalf of a Deviſee, or *Heres Factus*, of the Real Eſtate, as of the *Hæres Natus*, for which the Caſes cited were *Gray* and *Gray*, *Chiceſter* and *Phillips*, *Hale* and *Hale*, and other Caſes.

My Lord *Chancellor* was now clear of Opinion, that the Perſonal Eſtate in this Caſe muſt be applied accordingly; for he ſaid, here was plainly a Debt, tho' it was a

Debt

Debt of a ſpecial Nature, and for which the Security was limited; for on failure of Payment on any *Michaelmas-Day*, the Mortgagee might bring his Ejectment, and recover the Poſſeſſion, which he ſhould hold 'till his Debt is ſatisfied, or 'till Payment by the Mortgagor, or his Heirs; and tho' no Action of Debt, or Covenant lay, yet ſince there was a Remedy for it, he thought it clearly a Debt; and that the Deviſe to his Executors, as well to pay his Debts, as to levy his Debts, plainly ſhewed his Intention to diſcharge all his Debts thereout; and therefore this being a Debt, tho' of a ſpecial Nature, muſt be paid amongſt the reſt, tho' the Plaintiff was not the immediate Heir to the Mortgagor, but only the Heir of the Heir.

Caſe 300.

Anonymous.

A Judgment ſhall have no Relation but from the Time of Signing.

IT was held by my Lord *Chancellor*, that upon the Statute of *Frauds* and *Perjuries*, a Judgment ſhall have no Relation, but from the Time of the Signing, not only as againſt Purchaſors of the Lands themſelves, but alſo as againſt Prior Judgments enter'd in the *Grand Seſſions* of *Wales*, to which that Statute does not extend; and therefore, as objected, the Judgment in the *Common Pleas*, tho' ſubſequent in Time to the other Judgments at the Grand Seſſions, yet if it might relate to the firſt Day of the Term, it would take Place of the other Judgments; but my Lord ſaid, that a Man who truſted his Money on a Judgment, was in ſome ſort a Purchaſor of the Land, as he might take out Execution, and extend the Land itſelf; and therefore if he found no Judgment Prior, he thought his Security good; and that the Rule the Statute had laid down for the ſafety of Purchaſors of the Lands themſelves, was a good Rule to follow in the preſent Caſe, and the Relations were not to to be favoured in a Court of Equity.

But Sir *Thomas Powis* insisted strongly, that the Statute extended only to Purchasors of the Lands, and therefore said, a Judgment should have the same Relation still, as it would have had at Common Law, against a voluntary Settlement, or against one who came to the Lands by any Conveyance without valuable Consideration, and this was not denied by the Court; but in the present Case, if the subsequent Judgment in the *Common Pleas* should have such Relation, it would defeat Real Creditors, who trusted to the Priority of their Judgments, which my Lord *Chancellor* thought ought not to be overthrown by a Fiction of Law.

DE

Termino S. Hillarii,

1717.

In Curia Cancellariæ.

Cafe 301.

Marfhall verfus *Frank* & Ux'.

Where a Settlement fhall be good and take Effect, tho' not according to the Intent of the Parties.

ONE having Iffue a Daughter by his firft Wife, who was dead, and being poffeffed of feveral Meffuages for a Term of 999 Years, makes a Mortgage of them for fecuring the Sum of 100 *l.* and after, on his Marriage gives Bond to Truftees to leave 200 *l.* to his intended Wife, at his Death; then the Marriage takes Effect, and the Wife being poffeffed of a Leafehold Eftate, the Hufband, in Confideration of his Wife's having joined with him in the Sale and Difpofition of her Leafehold Eftate, and alfo in Confideration of the Delivery up of the Bond, by Indentures of Leafe and Releafe, grants, bargains, fells and demifes his own Leafehold Eftate to Truftees and their Heirs, to the Ufe of himfelf and his Wife, for their Lives, and the Life of the Survivor of them, Remainder to the Heirs of the Wife, and covenants, that he was feifed in Fee; then the Wife dies without Iffue; but before her Death fhe makes a Writing in Nature of a Will, and thereby devifes the Premiffes fo fettled on her to the Plaintiff, and his Heirs; and the Plaintiff after got a Releafe from the Heir at Law of the

Wife; the Husband afterwards, on the Marriage of his Daughter with the Defendant *Frank*, enters into Articles, whereby he agrees to settle and convey the Premisses on the Defendant and his Wife, and their Issue; and the Defendant afterwards having Notice of the first Settlement, pays off the Mortgage, and takes an Assignment of the Mortgage Term; and this Bill was brought by the Plaintiff, as Devisee of th eDefendant's Mother, to have a Redemption of the Term, and the Benefit of the Devise; the Defendant pleaded the Articles made on his Marriage, and that he was a Purchasor for valuable Consideration, and had no Notice of the first Settlement, but would not swear this Plea; so the Plea being overruled, and his Title set forth by Way of Answer, as before,

It was now insisted for the Defendants, that admitting any Thing passed by the Lease and Release to the Mother, under whom the Plaintiff claimed; yet that it was only a voluntary Settlement, and therefore ought not to take Place against the Defendants, who were Purchasors for valuable Consideration, and as they pretended, without Notice, tho' this was not sworn.

That the Settlement was voluntary, appeared from its being made after Marriage, and the Consideration of the Wife's having joined with her Husband in the Sale of her Estate was nothing, that being only Leasehold; the Husband had absolute Power to dispose of it without her; and therefore her Consent or Concurrence no Consideration; and as to the Delivery up of the Bond, that was now out of the Case, she dying before her Husband.

But 2*dly*, it was insisted, that nothing at all passed by the Settlement, for it being only a Term in gross, no Use passed to the Trustees, by the Statute of 27 *H.* 8. which only raised an Use, where the Person was seised; that by the Lease for a Year, which was only a Bargain and Sale, no Use passed, and there was no Attornment to vest it as a Reversion, and the Release being to inure

upon

upon it, by Way of Enlargement of Eſtate, if nothing paſſed by the Leaſe, or if no Poſſeſſion was transferred by that, then there was no Eſtate whereon the Releaſe could operate, and whatever Conſideration it might have in Equity to create a Truſt, could not affect the Defendants, who had both Law and Equity on their Side, Law by an Aſſignment of the legal Intereſt from the Mortgagee, and Equity as Purchaſors for a valuable Conſideration.

That beſides, the Eſtate ſettled on the Mother, being only a Term for Years, the Limitation to her Heirs was void; and admitting it had been good, yet ſhe was under Coverture, and had no Powe. whatſoever to make a Will, and conſequently the Deviſe thereof to the Plaintiff was void; and then the Releaſe of her Heir at Law could have no Operation, nor had he any Intereſt in him to Releaſe; and then the Term went to the Huſband, he ſurviving his Wife, and conſequently this Settlement on the Defendants muſt take Place.

That the Huſband was alſo the Perſon intitled to take out Adminiſtration to the Wife; and therefore admitting this Settlement ſhould paſs the whole Intereſt in the Term, yet the Huſband might at any Time take out Adminiſtration to his Wife, and thereby entitle himſelf to it.

On the other Side it was inſiſted, that the Huſband had actually taken out Letters of Adminiſtration to the Wife; and tho' he had not the Letters of Adminiſtration in Court, yet it being ſent to the Maſter to enquire, whether the Lands comprized in the Articles made on the Daughter's Marriage, were the ſame which were mentioned in the Mother's Settlement (there being ſome Reaſon to doubt of it) the Court left the Plaintiff at Liberty to produce his Letters of Adminiſtration before the Maſter.

And my Lord *Chancellor* was of Opinion, that either by Virtue of ſuch Adminiſtration, or by the Deviſe of the Wife operating as an Appointment, or by the Releaſe of the Heir at Law of the Mother, by ſome, or one of

all thoſe Ways, the Plaintiff ought to be let into a Redemption of the Term; for tho' the Settlement could not operate as a Leaſe and Releaſe, yet the Huſband being in Poſſeſſion, and not the Mortgagee, and there being the Word *Grant* in the Releaſe, it took Effect as a Grant or an Aſſignment of his whole Intereſt at Common Law; and tho' it could not go to the Heirs of the Wife, yet his Intention being plain to exclude himſelf from the whole Intereſt of his Eſtate, he ſhould not after be admitted to derogate from it; and therefore it ſhould veſt in thoſe in whom by Law it might, which was the Adminiſtrator of the Wife; for as the Huſband intended to diveſt himſelf of the whole Fee, if it had been a Fee, there was no Reaſon, when it appeared to be a leſs Intereſt, that this ſhould not paſs; and therefore was of Opinion, that the Defendants ought to aſſign on Payment by the Plaintiff of the Principal and Intereſt, but ſent it to a Maſter to enquire, as to the Value of the Lands.

Pinbury and *Elkin*.

Caſe 302.

11 February.

A Man by his Will deviſes all his Goods, Chattels, and Perſonal Eſtate, to his Wife *Eſter*, provided, that if ſhe die without Iſſue by me, then 80 *l.* ſhall remain to my Brother *John Davis*, and makes his Wife Executrix, and dies; *John Davis* dies in the Life Time of the Wife, and then the Wife dies, without Iſſue; and this Bill was brought by the Adminiſtrator of *John Davis* for the 80 *l.* and the only Queſtion was, Whether the Plaintiff had any Title to it upon the Words of this Will: There was no Doubt made, but that if the Deviſe over to *John Davis* were good, the Plaintiff as his Adminiſtrator would be intitled to it, tho' he died in the Life Time of the Wife, the firſt Deviſee; but whether the Deviſe over in this Caſe was good, was the Queſtion.

A. Deviſes all his Perſonal Eſtate to his Wife, provided, that if ſhe die without Iſſue by me, then 80 *l.* ſhall remain to my Brother *J. D.* and makes his Wife Executrix. *J. D.* dies in the Life Time of the Wife, and after the Wife dies without Iſſue: Whether this Limitation to *J. D.* be good ſo as to intitle his Adminiſtrator to it. *Q.*

It was argued, that it was; because the dying without Issue of the Wife, must be intended, dying without Issue at her Death, and not whenever there should be a failure of Issue of the Wife, which might happen 100 Years hence, or more, for that would be a Perpetuity, and not to be endured, and therefore, as dying without Issue has a two-fold Meaning, *viz.* either dying without Issue at the Time of her Death, or dying without Issue whenever the Issue fails, it shall not be construed in the remoter Sense of those Words, but in the nearest and most natural Sense thereof, which confines it to the Time of her Death; and then the Devise over is good, and consequently the Plaintiff well intitled to it, and a Case of *Nicholls* versus *Hooper* was cited by Mr. *Williams* to that Purpose.

But it was argued on the other Side, that the Construction must be made from the Import of the Words, as they stand at the Time of the Will, and not from any Accident after; that her leaving no Issue at the Time of her Death, was an Accident subsequent to the making of the Will, and therefore of no Force to influence the Construction of this Will; that the Words were general, and not confined to the Time of her Death; and therefore, whenever the Issue failed, by the Import of this Devise, the 80 *l.* was to remain over; but that being unlimited, and tending to a Perpetuity of a Chattel, was against all the Rules of Construction hitherto allowed, which had never been carried beyond the Compass of a Life, or Lives in Being; that it was true, if the Devise over were good in its Creation, the Plaintiff would be intitled to it, notwithstanding the Death of *John Davis*, before it actually vested in him; for tho' it was but a bare Possibility, and could not have been granted or assigned by *John Davis*, yet it might have been released, or however will vest in his Executors or Administrators; but here it was void in its Creation, and against the Rules of Law hitherto allowed.

My Lord *Chancellor* took Time to look into the Will, ut ſeemed to be of Opinion for the Deviſe, and took a Difference between a Deviſe to one, and the Heirs of his Body; and that if he die without Iſſue, then to remain over; and the Deviſe in the preſent Caſe, which was only to the Wife generally, and if ſhe die without Iſſue; that in the firſt a Limitation of a Chattel over would be void; but in this Caſe it was not a Deviſe over, but a Contingent or Condition precedent, which being fulfilled by the Death of the Wife, without Iſſue, the Deviſe over may take Place, as a new original Deviſe, not as a Remainder; for by the Deviſe to the Wife generally the whole Intereſt was not abſorbed, or taken up, as it was in Caſe of a Deviſe to her and her Iſſue; and therefore upon the happening of the Contingency it might take Place; but this was thought by ſeveral to be all one, and would introduce a Perpetuity, ſince not confined to the Death of the Wife, or any Time certain; and who muſt have it in the mean Time; but my Lord would conſider of it.

DE
Termino Paſchæ,
1718.
In Curia Cancellariæ.

Caſe 303. **Marks** verſus **Marks.**

A. had Iſſue three Sons, B. his eldeſt, who died in his Life Time, leaving a Daughter, and C. and D. A. deviſes Lands to his Wife for Life, and after her Death to D. and his Heirs, provided, that if C. do within three Months after the Death of the Wife pay to D. the Sum of 500 l. then the Lands to remain to C. and his Heirs. C. died in the Life Time of the Wife, the Heir of C. ſhall take Advantage of this Condition, and not the Right Heirs of the Teſtator.

William Marks having Iſſue three Sons, *William* his eldeſt, *Nathaniel* his ſecond, and *Daniel* his third Son; and *William* the eldeſt Son dying in his Father's Life Time, leaving Iſſue only a Daughter; the Father afterwards by his Will in Writing, deviſes the Eſtate in Queſtion to *Anne* his Wife, for her Life, and after her Death to his Son *Daniel* and his Heirs, provided, that if *Nathaniel* do within three Months after the Death of my Wife pay to *Daniel*, his Executors or Adminiſtrators the Sum of 500 *l.* then the ſaid Lands ſhall come to my Son *Nathaniel* and his Heirs: The Wife lived ſeveral Years after, and during her Life, *Nathaniel* died, leaving the Plaintiff his Heir, and the Wife dying about two Years ago, the Plaintiff brought this Bill within three Months after her Death, praying, that upon Payment of the 500 *l.* he might have a Conveyance from the Defendants, ſome whereof had Mortgages upon the Eſtate, made to them by *Daniel*; and the Wife of *Daniel* by Order of Court being admitted to put in her Anſwer ſeparately from her Huſband, ſhe inſiſted on a Settlement of thoſe Lands, and as between the ſeveral Defendants, the Que-

ſtion was, which of them had the better Title, either to the Money, if that were to come in lieu of the Land, or to the Land itſelf, in Caſe the Payment could now not be admitted, and that depended on Notice, or not Notice of the Will amongſt themſelves; but the principal Point was, Whether this 500 *l.* being to be paid by *Nathaniel* within a limited Time, and he dying before that Time came, Whether his Heir at Law could now on Payment of the Money make a Title to thoſe Lands, for it was agreed he was not Heir at Law to the Teſtator, but the Daughter of the eldeſt Son.

It was argued, that the whole Value of the Lands was but about 1000 *l.* and that the Intention of the Teſtator was to divide it equally between his two younger Sons; and that if *Nathaniel* had the Lands, he ſhould pay his Brother *Daniel* 500 *l.* out of it; but whether that Payment could now be made, that is, Whether it were not too late, and the Time lapſed for Payment of it by the Death of *Nathaniel*, was the ſingle Queſtion.

It was argued by Sir *Thomas Powis* and Sir *Robert Raymond*, that it was not, and they cited and relied on the Text of *Lit.* and the Comment of *Cooke* thereon, *Co. Lit.* 205 *b.* 219 *b.* that where a Feoffment is made to one, and his Heirs, upon Condition, that if a Feoffor do within ſuch a Time pay ſuch a Sum of Money to the Feoffee, *&c.* that tho' the Feoffor die before the Day, that his Heirs may perform the Condition for the four Reaſons therein mentioned, and principally, becauſe a Time being limited for the Payment of it, and the Feoffor dying before the Time, as that was the Act of God, ſo the Feoffee had no Wrong done him when the Money was paid, Whether it were by the Feoffor or his Heirs; and Sir *Robert Raymond* cited 1 *Chan.* Caſes 89, and the Caſe of *Bertie* and *Falkland*, 3 *Chan.* Caſes, that it was laid down as a Rule by my Lord *Somers*; that where the Party might be put in as good Plight, as where the Condition itſelf was literally performed, that this Court would relieve, tho' the Letter of it were not ſtrictly

performed, as Payment of Money, *&c.* but where the Condition was collateral, as in the principal Caſe there, and no Recompence or Value could be put on the Breach of it, there no Relief could be had for the Breach of it.

On the other Side it was argued by Serjeant *Hooper* and Mr. *Mead*, that the Caſe in *Co. Lit.* was but in Nature of a Mortgage; that it was to relieve againſt a Forfeiture by Non-Payment of the Money at the Day which may be good, even at Law, much more in this Court; that there was a wide Difference between a Condition precedent, and a Condition ſubſequent, that that was a Condition Subſequent, and for reveſting of the Eſtate, and the Condition deſcended on the Heir, and conſequently might be performed by him, tho' not named; that this was a Condition precedent, and for the new Creation of an Eſtate in a Perſon who had no Right or Title before, and was not Heir at Law; that this was Perſonal in *Nathaniel*, that he had not *Jus in re*, nor *ad rem*, and could neither have deviſed, releaſed, or extinguiſhed this Condition; that it was a bare Poſſibility, and he dying before it was performed, his Heir could not make it good.

But the Maſter of the *Rolls* ſaid, this was not a Condition at all, becauſe that is only ſuch as may be performed by the Party himſelf, from whom it moves, or his Heirs; but this in the preſent Caſe is to be performed by a third Perſon. *2dly*, This is not in the Nature of a Remainder to *Nathaniel*, becauſe the Deviſe to *Daniel* is not in Tail, but in Fee; and a Remainder can only be after an Eſtate Tail, or a leſs Eſtate; but this being after a Fee, is an executory Deviſe, it may be called a Poſſibility in the largeſt Senſe of that Word, but 'tis not ſtrictly ſuch, for nothing was veſted in *Nathaniel*, which he could either grant or releaſe, nor did any Thing deſcend to his Heir; that Heirs in this Caſe were not named to take by Purchaſe, but by Deſcent; that the Reaſon of their being named was to denote the Quantity

of the Eſtate, which *Nathaniel* was to take, not to give them any Eſtate originally, and cited *Lampat*'s Caſe 10 *Co.* and *Brett* and *Rigden*'s Caſe, *Plow. Com.*

But the Council inſiſted, that the Poſſibility of performing this Condition, was an Intereſt or Right, or *Scutilla Juris*, which veſted in *Nathaniel* himſelf, that he ſurvived the Teſtator; and therefore this differed from *Brett* and *Rigden*'s Caſe; that conſequently ſuch Right, Poſſibility, or Intereſt deſcended to his Heir, and might be performed by him, as before the Statute *de donis*, the Poſſibility of Reverter deſcended to the Heirs of the Donor, and cited *Purefoy* and *Roger*'s Caſe, 2 *Sand.* and the Earl of *Kent*'s Caſe *Cro. Car.* 358, *Pell* and *Brown*'s Caſe, *Cro. Jac.* 591, 8 *Co. Matthew Manning*'s Caſe, and ſome others, but the Caſe being thought a Matter of great Difficulty, the Maſter of the *Rolls* appointed them to ſpeak to it again, when the Court was full.

Afterwards in *Mich.* Term. 5 *Georg.* 1. it was by the Lord *Chancellor*, and Maſter of the *Rolls* decreed, for the Plaintiff, on *Lit. Sect.* 334, 335, 336-7. *Co. Lit.* 205, 206-7, and they ſaid, that tho' a Condition was not in ſtrictneſs of Law deviſeable; yet ſince the Statute of Uſes, the Deviſee may take Benefit of it by an equitable Conſtruction of that Statute, and that *Nathaniel* might have releaſed or extinguiſhed his Right.

Hewitt verſus *Ireland*.

Caſe 304.

Husband and his Wife having Iſſue one Daughter, join in a Conveyance of the Wife's Land, and agree that 600 *l.* part of the Purchaſe Money ſhould be ſettled in Manner following, *viz.* 30 *l.* a Year, the Intereſt thereof to be paid the Husband during his Life, and after his Death to his Wife for Life, and after their Deaths the Intereſt to be paid to ſuch Daughter or Daughters, as ſhall be begotten between them, 'till they ſhall attain their reſpective Ages of 21, or be married; and then the principal Sum to ſuch Daughter or Daughters; but in Caſe there ſhall be no Daughter, then to the Survivor of the Husband or Wife. *A.* married the Daughter, and in Conſideration of this 600 *l.* made a Settlement on her, the Daughter died in the Life Time of her Father and Mother, and ſoon after the Mother died without Iſſue, the Husband is intitled to it as her Adminiſtrator.

ONE *William Stringer* being ſeiſed in Fee of an Eſtate in Right of his Wife, and having Iſſue only one Daughter, who was about the Age of 10 Years, *Stringer* and his Wife enter into an Agreement with the Plaintiff for the Sale of this Eſtate; and that out of the Purchaſe-

Purchase-Money, 600 *l.* should be secured as a Provision for the Wife and her Children, and Conveyances were executed to the Plaintiff accordingly; and the 600 *l.* part of the Purchase-Money was secured by Way of Mortgage, in this Manner, *viz.* 30 *l.* a Year, the Interest thereof was to be paid to *William Stringer*, the Husband, during his Life; and after his Death to his Wife for her Life; and after their Deaths, then the Interest to be paid to such Daughter or Daughters as shall be begotten between them, 'till they shall attain their respective Ages of 21 Years, or be married; and then the said principal Sum of 600 *l.* to such Daughter or Daughters equally between them; and in Case there shall be no such Daughter or Daughters, then to the Wife, in Case she shall survive her Husband; but in Case he shall survive her, then to the Husband, his Executors and Administrators.

The Defendant *Ireland* intermarried with the Daughter which *Stringer* and his Wife had before this Settlement, and in Consideration of this 600 *l.* made a Settlement on her; the Daughter died in the Year 1708, and in the Year 1715 the Mother died, *Ireland* took out Administration to his Wife, and by Virtue thereof claimed this 600 *l.* *Stringer* the Husband claimed it, as surviving his Wife, and there was no other Issue, save only this Daughter, which was born 10 Years before the Settlement.

And now the Plaintiff brought this Bill in the Nature of an Inter-pleading Bill, that he might know to which of the Defendants he might with safety pay the Money, and it was decreed for the Defendant *Ireland*; for it was said it could never be the Intent of this Settlement to provide for Daughters which might probably be never *in esse*, and in Fact, as the Case has happened, never were *in esse*, and to leave a Daughter, which was then about 10 Years of Age, had never done any Thing to disoblige her Parents, and was wholly unprovided for, without any Provision at all; that tho' the Words seemed to have

a future Relation from the Time of the Settlement; yet the Intent was only futurely, as to those which should be begotten at the Death of the Father and Mother, that this Daughter came within that Construction, that it was like a Limitation to one and his Issue, *Procreatis* or *Procreandis*, that if it were *Procreatis*, it would take in those born after; if it were *Procreandis*, it would let in those born before; so here the Intention never was to exclude this Daughter, and consequently the Defendant her Husband is intitled to it, and it was decreed accordingly with Costs.

A Limitation to one and his Issue, *Procreatis* takes in those born after one and his Issue, *Procreandis* extends to those born before.

Warner versus *Hone*.

Case 305.

*T*Homas *Gladwin* being possessed of several Leasehold Houses for several Terms for Years, makes his Will, and thereby devises his said Leasehold Houses to *Anne* his Wife for her Life, and after her Death, I give and devise the same to *Alice Bunion*, and her three Sons equally amongst them.

A Devise of a Leasehold Interest to *A.* and her three Sons equally amongst them, creates a Tenancy in Common, tho' there is no Mention of any Division to be made.

And it was decreed, that they took as Tenants in Common, tho' there was no Mention of any Division to be made, or equally to be divided between them; and accordingly the Plaintiff, who was Administrator of *Alice Bunion*, and had brought this Bill for an Account of the Profits, had an Account of the Profits for the Time past, and that he should be let into a fourth Part of the Rents and Profits for the Time to come.

Case 306.

Atwood versus *Atwood.*

A Wife cannot, either by herself or her *Prochein Amy*, bring a *Homine Replegiando* against her Husband.

IN this Case it was held, *per Cur'*, that a Wife cannot, either by herself or her *Prochein Amy* bring a *Homine Replegiando* against her Husband, for he has by Law a Right to the Custody of her, and may if he think fit, confine her; but he must not imprison her, if he does, it will be good Cause for her to apply to the Spiritual Court for a Divorce, *Propter Sevitiam*, and the Nature and Proceedings in the Writ *de Homine Replegiando*, show that it cannot be maintained by the Wife against her Husband.

3

DE

DE
Term. S. Trinitatis, 1718.
In Curia Cancellariæ.

Spence versus *Allen*.

Case 307.

A new Set of Interrogatories allowed to be settled before a Master, the former being suppressed, as leading.

IN this Case Interrogatories, and the Depositions of Witnesses taken on them, had been suppressed, for that the Interrogatories were leading, and then Publication passed; and now the Court was moved, that a new Set of Interrogatories might be drawn and settled by a Master for the Examination of this Witness, whose Evidence was very material, and yet must be wholly lost if the Court would not indulge them this Way; and tho' the Practice has been always against it, and it was insisted to be of dangerous Consequence; yet one Precedent being produced to this Purpose, and the Interrogatories which had been suppressed were such as might have been drawn by many other Council, without any Apprehension of their being leading the Court to let in the Party to the Benefit of this Witness's Testimony, ordered Interrogatories to be put in, and settled by a Master for his Examination over again.

Case 308. **_Wright_ versus _Pilling._**

Whether a Judgment Creditor may as well secure himself by buying in a Prior Incumbrance, as a third Mortgagee may by taking an Assignment of the first Mortgage.

ONE *Crokroft* being possessed of a Term for Years, determinable on the Death of his Wife the 16th of *April* 1694, borrows of the Defendant the Sum of 40 *l.* and the 18th of *July* 1704, he borrows of the Defendant a further Sum of 83 *l.* and gives him a Bond for both; in *Hill.* Term 1704, the Defendant obtains Judgment on his Bond against *Crokroft*; but before he had taken out Execution, *viz.* 7 *March* following, *Crokroft* Mortgages this Term to the Plaintiff, who was an Attorney, and had been concerned for him as such in several Causes, and had expended several Sums of Money for him therein, which are mentioned to be the Consideration of the Mortgage; and on the 10th of the same Month purchases the Equity of Redemption; on the 23d of the same Month the Defendant takes out a *Fi. Facias* on his Judgment, and this was sold thereon by the Sheriff to one *Harrison*, but this was in Trust for the Defendant; after which the Defendant having Notice that there was an old Mortgage standing out, which was made the 21st of *July* 1699; he takes an Assignment of that Mortgage, and also takes an Assignment of a Judgment, which one *Sparks* had obtained some Years before against *Crokroft*, and for the Mortgage he paid 144 *l.* and on the Judment about 30 *l.* and the Plaintiff having brought his Bill against the Defendant, had a Decree at the *Rolls* to be let into a Redemption, on Payment only of what he had paid for the Assignment of the Mortgage, for that, as it was held, he could not so tack his own Judgment, and the Judgment of which he had taken an Assignment to the Mortgage, as to withhold the Term from the Plaintiff, who had now not only a Mortgage, but had also purchased in the Equity of Redemption; and the Defendant thinking himself agrieved by this Decree, did now Appeal from it.

3

And

And it was argued for him, that he ought to hold this Term 'till both his Debts were ſatisfied, that it was like the Caſe of a third Mortgagee buying in the firſt, that he ſhould hold out the ſecond Mortgagee, 'till his whole Money ſatisfied; that the Plaintiff was an Attorney, and the whole Conſideration of this Mortgage and Purchaſe was made up of Bills of Coſts, and Buſineſs done; that his Deeds in Truth were antidated, and that there was little or nothing due to him.

On the other Side it was argued by Mr. *Vernon*, that the Difference had always been taken between a General Incumbrancer by Statute or Judgment, and a Purchaſor or Mortgagee; that the one was no lien on any particular Part of the Eſtate, but affected it only at large, whereas in Caſe of a Mortgage or Purchaſe, the Party contracted for that particular Part; that if a Man had confeſſed 20 Judments or Statutes, the laſt could not by buying in the firſt hold out all the intervening Judgments; which the Court agreed to be ſo, becauſe, when the Debt on the firſt Judgment was paid, that Security determined and expired of itſelf; and Mr. *Vernon* ſaid, he had always taken the Courſe to be, that a Judgment Creditor could not any Ways mend or better his Security, by taking in a Prior Mortgage, and cited the Caſe of Sir *William Baſſet* to that Purpoſe; and he likened it to the Caſe of a Dowreſs, which muſt take as the Law gives it; but a Jointreſs contracts for the very Eſtate itſelf; that this was but a Term for Years, and therefore not affected with the Judgment 'till the *Fi. Fac.* lodged in the Sheriff's Office, which was not done 'till the 23d of *March*, long after the Plaintiff's Mortgage and Purchaſe; that this was the ſtronger, becauſe *Crokroft* had not the legal Intereſt of the Term in him neither; that he had only any equitable Intereſt in it at the Time of this Execution taken out; and tho' the Sale of the Term might in Equity paſs that Intereſt, yet it ought not to hurt the Plaintiff, or hold him out, who was a prior Purchaſor; that there was no Proof of antedating, nor did

it appear, that the Consideration of the Plaintiff's Purchase was made up as the Defendant pretended; but at last the Defendant offering to go before a Master, and to pay him all that he could prove to have really paid, or to be really due to him, together with Interest and Costs, the Plaintiff was advised to comply with it, and to turn his Purchase into a Mortgage, which he consented to, and so the Cause went off.

But my Lord *Chancellor*, and several at the Bar seemed not to agree to the Distinction taken by Mr. *Vernon*, but thought a Judgment Creditor might as well secure himself by taking in a prior Mortgage, as the third Mortgagee, for that his Judgment was a lien on the Land, and when he gets in a prior Mortgage, that ought not to be taken from him 'till Payment of his whole Debt.

On Appeal from the *Rolls* to my Lord *Chancellor*, the Cause is open, and the Party is at Liberty to read new Proof, and offer what he can against the Decree.

And in this Case one Question was, Whether on the Appeal the Party might be admitted to read to any Thing which he had not before proved on the first hearing; and my Lord *Chancellor* was of Opinion he might, for that, as he said, it was to be inrolled as his Decree, and the Appeal was only to give him an Opportunity of hearing what could be offered why he should not inroll it as his Decree; and therefore the Cause was intirely open, and the Party at Liberty to offer what he could against his signing and inrolling the Decree.

Case 309.

Augier versus *Augier*.

In what Cases Court of Equity will Decree a Wife Alimony, tho' she may have a Sentence for it in the Spiritual Courts.

THE Plaintiff brought this Bill by her *Prochein Amy*, against the Defendant, her Husband, for a special Execution of Articles, whereby the Defendant was to allow her 52 *l. per Ann.* separate Maintenance.

It appeared in the Cause, that the Plaintiff brought 1200 *l.* Portion to the Defendant, who was a *Hop* Merchant, and lived in *Southwark*, and was a Man of good Credit and Business, and soon after Intermarriage, such Differences

Differences arose between them, that it became impossible for them to live together any longer.

On the Plaintiff's Part it was proved, that the Defendant had several Times beat and abused her, that he had whiped her with a Horse Whip, tore her Head Cloaths, and deny'd her Necessaries.

On the Defendant's Part it was proved, that the Plaintiff was a Woman of a most perverse, morose, and malicious Temper; that she would suffer none of the Defendant's Friends or Relations to come to the House; that she had oftentimes affronted the Defendant's Father (who as it was proved in the Cause, was a Man worth 20000 *l.*) and Mother; that she did all she could to vilify and expose the Defendant; that she chose to wear the dirtiest Cloaths she had; that she would often, when Customers were in the Shop, take Occasion to come out and ask for Money to buy her Bread, tho' it was proved the Defendant kept a very plentiful House; that he allowed the Plaintiff, even to Superfluities; that he had made her Presents of fine Cloaths, a Gold striking Watch, and several other Ornaments; that the Plaintiff was addicted to drinking Brandy, and other strong Liquors to excess; that she was guilty of the most provoking, disdainful Behaviour possible towards her Husband; and that at last she left him for about two Months, after which she libelled in the Spiritual Court for Separation and Alimony; and whilst the Cause was there depending, the Defendant entred into the Articles in Question, with one *Abell*, in Behalf of the Plaintiff, whereby the Defendant agreed to allow his Wife 52 *l. per Ann.* separate Maintenance, and to permit her to live where she thought fit, without any Molestation or Disturbance from him; but the Defendant being desirous to have his Wife home again, and to come to a Reconciliation with her, for some Time had withdrawn the Payment of this Allowance, which was to be 20 *s.* a Week; therefore to have the Arrears for the Time past, and the growing Rents and Payments

during the Time of their Separation, this Bill was now brought.

The Defendant insisted, the Plaintiff was not intitled to the Assistance of this Court for carrying these Articles into Execution; that to decree that, was to decree a Separation, which was the Business only of the Spiritual Court; that Alimony continued no longer than 'till they became reconciled, and consented to cohabit; but if these Articles be decreed to be executed, no Reconciliation afterwards could set them aside; that the Wife in this Case was not at all bound; that the Articles were only signed by *Abell*, and not by her; and therefore it is unreasonable, that the Husband should be fast, and the Wife loose.

On the other Side it was argued, that these Articles ought to be carried into Execution; that they were intended to supply the Sentence in the Spiritual Court, and to prevent the Charge and Trouble of a solemn Litigation there; that the Husband, by entring into them, had given Sentence against himself, and could not be charged, even at Law for any Debts of his Wife's; that the Husband and Wife were often considered in this Court as separate Persons; that tho' this Court could not decree Alimony, yet it might decree Execution of Articles according to the Parties own Agreement; and several Precedents had been in this Court to that Purpose, as Sir *James Oxendon* and his Lady, and a Case of *Catting* and *Catting*, and several other Cases.

My Lord *Chancellor* was of the same Opinion, and said, that to decree an Execution of these Articles, was not to invade the Jurisdiction of the Spiritual Court; that the Intent of these Articles was to save the Expence of a Sentence in the Spiritual Court; that if these Articles could not be decreed here, they would be of no Force any where; that there was no Remedy upon them at Common Law, for there the Wife could not sue her Husband; that it could not be pretended that the Spiritual Court had any Power to decree a Performance of them;

them; that where a Husband makes a ſeparate Proviſion for the Wife, he is not chargeable by Law for her Debts; but tho' that were ſo, yet to avoid the Expence he might be put to in defending ſuch Suits, he ſent it to a Maſter to ſettle a Security to indemnify him againſt the Wife's Debts, and decreed the Arrears and growing Payments of the 52 *l. per Ann.* to be paid to the Wife, and ſaid, this was not a Decree of Alimony, or to decree a Separation between them, for that they might whenever they thought fit come together again, and then the Articles would be no further binding.

Walſam verſus *Skinner*.

Caſe 310.

An after-born Child of a Freeman of *London* ſhall come in with the others for a Cuſtomary Share.

IN this Caſe it was agreed by the Council on both Sides, that an after-born Child ſhould come in with the reſt for their Cuſtomary Share of a Freeman of *London*'s Perſonal Eſtate.

The Third Part of a Freeman of *London*'s Perſonal Eſtate, which he has a Power of diſpoſing of, ſhall upon his dying Inteſtate, go according to the Statute of Diſtributions.

2*dly*, It was agreed as an undoubted Rule, that where a Freeman died Inteſtate, leaving a Wife and Children; that one third Part of his Perſonal Eſtate, and the Widow's Chamber was to go to the Wife, one other Third to the Children; and the dead Man's Third to go according to the Statute of Diſtributions, *viz.* two Thirds to the Children, and the other Third to the Wife; and that the dead Man's Third was not at all under the controul of the Cuſtom.

DE Termino S. Mich. 1718.

IN CURIA CANCELLARIÆ.

Case 311. **Bacon versus Clerk.**

A. seised of an Estate in Possession, and of a Reversion Expectant on the Death of *J. S.* devises the Estate in Possession to his Wife for Life; and having a Son and a Daughter, he devises the Estate in Possession after his Wife's Death, and likewise his Reversion, to his Son, upon Condition that he paid the Daughter 1000 *l.* within 12 Months after the Death of *J. D.* and on Default, that she may enter. *J. D* died, living the Wife and *J. S.* on a Bill brought by the Daughter and her Husband, decreed the Portion to be raised, tho' neither of the particular Estates were determined.

*A*Braham *Clerk*, Father of the Plaintiff and Defendant, being seised of an Estate in Possession in *London* and *Middlesex*, and of another Estate in Reversion, in the County of *S.* expectant on the Death of *Horatio Herne*, by his Will devises his Estate in *London* and *Middlesex* to his Wife for Life; and after her Death, to the Defendant his Son, and his Heirs; and also devises his Estate in the County of *S.* to the Defendant, and his Heirs likewise, from and after the Death of *Horatio Herne*, upon Condition, nevertheless, that my said Son shall pay unto my Daughter *Elizabeth* (the Plaintiff's Wife) the Sum of 1000 *l.* within 12 Months after the Death of *Elizabeth Herne*; and if he does not pay the said 1000 *l.* that then my said Daughter shall enter into my said Lands and Estate in *London* and *Middlesex*, and receive the Rents and Profits thereof 'till the said 1000 *l.* shall be paid. The whole Estate was about 230 *l.* *per Ann.* *Elizabeth Herne* died in 1713, soon after the Testator's Death; but the Testator's Widow and *Horatio Herne* were both still living.

And

And this Bill was brought to have the Reverſion of theſe Eſtates ſold forthwith, and the 1000 *l.* paid to the Plaintiff, with Intereſt, from the Death of *Elizabeth Herne*; the Cauſe came on only on Bill and Anſwer; and therefore, tho' it was ſaid, the Reaſon of appointing this 1000 *l.* to be paid within 12 Months after the Death of *Elizabeth Herne* was, becauſe ſhe had an Eſtate of 130 *l. per Ann.* for Life, which after her Death came to the Defendant; yet there being no Proof of that, it could have no Weight at all in the Caſe.

For the Plaintiff it was urged, that tho' the Eſtates which were to be the Fund for raiſing this Portion, were yet but Reverſions; yet the Portion became due from 12 Months after the Death of *Elizabeth Herne*; that this was a Charge on the Eſtate in Equity from that Time; and therefore it ought to be raiſed by a Sale of the Reverſion, and Intereſt to be computed from the Time it became due; that the Clauſe which gave her a Power of entring, in Caſe it were not paid, was only an additional Remedy; and therefore ſhe could not enter whilſt the Life Eſtates were in Being; yet that was not to poſtpone the Time of Payment of her Portion; that if ſhe muſt wait 'till the two Eſtates for Life fell, ſhe might never have any Portion at all; that this Condition being annexed to the Deviſe of the Eſtate to the Heir at Law, was void at Law; but yet it amounted to a Charge in Equity, then it was uſual to decree a Sale of ſuch Reverſions, as has frequently been done of Reverſionary Terms for Years, that Children might not be without their Portions when they have moſt Occaſion for them; that if *Elizabeth Herne* had been ſtill living, tho' the two Life Eſtates had dropt, yet the Plaintiff could not have demanded her Portion; but now *Elizabeth Herne* being dead, tho' the two Life Eſtates are ſtill in Being, yet her Portion is become due.

On the other Side it was argued, the Intention of the Teſtator was plain, that this Portion ſhould not be raiſed 'till the Eſtates fell in, that he had therefore given her a

Power of Entry, to receive the Profits, in Case the Portion was not paid, which yet she could never do whilst the Estates for Life continued; that the Defendant was Heir at Law, and by this Construction of allowing Interest, might be so loaded as to have nothing left; that the Course of selling Reversionary Terms to raise Portions was new; and my Lord *Cowper* declared, had it been *res integra*, he would not have done it; that therefore it ought to be carried no further; that a Case of *Butler* and *Duncombe* was now under my Lord's Consideration on that very Point.

But the Master of the *Rolls* was of Opinion, that it was not the Testator's Intention this Portion should wait 'till the Reversions fell in; that the Estate being devised to the Heir at Law, the Condition was plainly void at Law, according to *Boraston*'s Case, 3 *Co.* 20, that the Estates for Life being still in Being, the Daughter had no Remedy but in a Court of Equity to have her Portion raised; that this amounted to a good Charge in Equity, and that Decrees for Sale had been frequent in the like Cases; and therefore decreed the Reversions to be sold, and the 1000 *l.* to be paid to the Plaintiff, with Interest from 12 Months after the Death of *Elizabeth Herne*, and said, the Clause which gave a Power of Entry, was only to be intended, in Case the Estates for Life fell in the mean Time, so that she might thereby enter, not to delay the Payment of the Portion 'till that Time.

Case 312.

Anonymous.

Tho' Tradesmen, who trust a married Woman with Necessaries suitable to the Degree and Quality of the Husband, shall recover of the Husband; yet if any Person lends her Money which is actually laid out in Necessaries, they cannot sue the Husband; but Equity will suffer such Persons to stand in the Place of those of whom such Necessaries were bought.

IT was agreed in this Case, that Tradesmen who trust a married Woman for Necessaries, shall recover against the Husband, so far as the Goods taken up appear to be necessary, according to the Degree and Quality of the Husband; but if a Man lends such married Woman Money, wherewith to buy Necessaries, and she accord-

accordingly lays out the Money, that the Person who lent the Money, has no Remedy to recover it against the Husband; and this was agreed to be a settled Distinction in *Scott* and *Manby*'s Case, and other Cases; and therefore the Plaintiff, who in this Case had supplied the Woman with Money in her Necessities, and now brought his Bill against the Executors of the Husband, for a Discovery of Assets, and a Satisfaction thereout of his Debt, could have no Relief on that Head, though the utmost unkind and cruel Usage of the Husband was proved; and that the Money lent was actually laid out and applied for Necessaries; but yet the Master of the *Rolls* said, the Plaintiff should stand in the Place of those Tradesmen, who had supplied the Wife with Necessaries, and be let into a Satisfaction for so much as he could prove to have been advanced or delivered to her by them, as Necessaries, as they themselves should have been, if they had been Plaintiffs, but for nothing more.

Lady *Pierpoint* versus Lord *Cheney*.

Case 313.

A. on his Son's Marriage, settles Lands on himself for Life, Remainder to the Son for Life, Remainder to Trustees for 500 Years for raising Portions for Daughters, payable at 21, or Marriage, with Maintenance in the mean Time to commence, after his, or his Son's Death. The Son has Issue a Son and a Daughter, and dies: Whether the Daughter shall have a Maintenance out of this Reversionary Term in the Life Time of her Grandfather?

THE Duke of *Kingston*, on the Marriage of his Son the Lord *Kingston*, settles Lands to the Value of about 900 *l. per Ann.* to the Use of himself for Life, Remainder to his Son the Lord *Kingston* for Life, Remainder to Trustees for 500 Years, with Remainder to the first and other Sons of that Marriage, and the Term is declared to be, that in Case there should be but one Daughter, then she to have 10000 *l.* for her Portion; and if there should be two or more Daughters, they to have 20000 *l.* to be equally divided between them, and to be paid at their respective Ages of 21 Years, or Days of Marriage, which should first happen; and in the mean Time, to have for their Maintenance 300 *l. per Ann.* 'till their Ages of 12 Years, equally between them, and

and from thence, 'till their Ages of 21, or Marriage, 400 *l.* *per Ann.* equally between them, the said yearly Maintenances to be paid at the four most usual Feasts in the Year, the first Payment thereof to begin, and be made at such of the said Feasts as should first and next happen after the Death of the said Duke of *Kingston*, and Lord *Kingston*, or either of them; the Lord *Kingston* had Issue a Son the Lord *Dorchester*, and also a Daughter, and then died.

And now this Bill was brought in the Life Time of the Duke, to subject this Term in Remainder, to the raising the 300 *l.* *per Ann.* for the Daughter's Maintenance, 'till 12, and for the raising the 400 *l.* *per Ann.* from thenceforth, 'till the Portion became payable; and that this might be done by a Mortgage of the Term, the Direction being, that it should be raised out of the Rents and Profits, which would, according to the Constructions in Equity in like Cases, amount to a Direction for the Sale or Mortgage thereof, if necessary; and for this were cited these Cases of *Gerrard* and *Wright*, *Cotton* and *Cotton*, *Corbett* and *Maidwell*, and other Cases, where Reversionary Terms had been decreed to be sold or mortgaged for raising Portions, even in the Father's Life Time, where the Time of Payment was come.

But this was opposed, and said, 1*st*, That no such Direction had ever yet been given for the raising of Maintenances only, whatever had been done as to the Portion itself. 2*dly*, That none would advance any Money on such a Reversionary Term, where the Rents could not be immediately Subject to answer the Interest; or if it could be raised, yet the Interest would so far eat into the Profits of the Estate, that it would not be sufficient to raise the Portion itself when it became due.

My Lord *Chancellor* said, he was of the same Opinion with those who had sat in that Court before him, that it was hard to extend the Construction on these Settlements to the Sale or Mortgage of such a Reversionary Interest; and that in Settlements drawn with Skill, there

was always a Reſtriction that it ſhould not be done 'till the Term commenced in Poſſeſſion; but ſince, there was no Reſtriction in the preſent Caſe; and yet this was only for raiſing the Maintenance, and not the Portion itſelf, which might, by ſubjecting the Term to an immediate Mortgage or Sale, be in Danger of being very much leſſened or ſunk; he ſent it to a *Maſter* to enquire and ſtate the Value of the Eſtate, and then to refer to the Court for farther Directions.

Bromfielf verſus *Wytherley*. Caſe 314.

An Executor or Truſtee Inſolvent at the Time they place out Money at Intereſt, ſhall, if they make any pay Intereſt, as they run no riſk, *ſecus*, of one who is in goodCircumſtances.

IN this Caſe a Difference was taken by my Lord *Chancellor*, that if an Executor or Truſtee of Money, places it out in the Funds, or on other Security, whereby he gains conſiderably, that he ſhall have the whole Benefit thereof to himſelf, in reſpect of the Hazard he run of being a conſiderable Loſer thereby, which he muſt have born; but if ſuch Truſtee or Executor were an Inſolvent Perſon at the Time of placing out ſuch Truſt Money, there the *Ceſtui que Truſt* ſhall have the whole Benefit gained thereby, as he only could have born the Loſs thereof, if any had happened; the Truſtee or Executor, by Reaſon of his Inſolvency being incapable thereof, and conſequently running no Hazard at all.

Babington verſus *Greenwood* & Ux'. Caſe 315.

A Freeman of *London*, on his Intermarriage, agrees with Truſtees to add 1500*l.* to the Wife's Portion, which was 1500*l.* more, to be laid out within two Years after the Marriage in a Purchaſe of Lands, and ſettled on the Husband for Life, Remainder to the Wife for Life, in lieu and bar of her Dower and Jointure, Remainder to their Iſſue; this is no Bar of the Wife's Cuſtomary Share.

THE Plaintiff's Father being a Freeman of *London*, and having no Real, but only a Perſonal Eſtate, does by Articles in 1694, on his Marriage with *Frances* his Wife, now the Wife of the Defendant, in Conſideration of 1500 *l.* Portion, to be paid to the Truſtees, covenant within two Years after the Marriage, to pay 1500 *l.* to the Truſtees; and his Wife's Father covenants likewiſe within the ſame Time to pay them 1500 *l.*

for

for his Daughter's Portion, which two Sums making 3000 *l.* are directed to be laid out in the Purchase of Lands, to be settled on the Husband for Life, Remainder to Trustees during his Life, to preserve Contingent Remainders, Remainder to the Wife for Life, for her Jointure, and in Bar of Dower; Remainder to such Child or Children to be begotten between them, by such Proportions, and in such Manner as he by Writing or Writings attested by three or more Witnesses should direct; and for want of such Direction to such Child or Children, equally to be divided between them, and their Heirs; and for want of such Child or Children, to his own right Heirs. The Marriage takes Effect, the two Plaintiffs are the only Issue of that Marriage; the Husband in 1703, by Will devises 3000 *l.* apiece to the Plaintiffs, to be paid at 21; and taking Notice of his Marriage Articles, and that a Purchase and Settlement had been made pursuant thereto; he confirms that Settlement, and devises the same Lands to his Wife according to the Settlement, for Life, and after her Death to his Children the Plaintiffs; and gives the Residue of his Personal Estate, except his Plate and Furniture, to the Plaintiffs, for their Lives, and in Case of their Deaths, to his Wife the Defendant, whom he makes Executrix, and dies; the Wife after his Death proved the Will, and gave Security to the *Chamberlain* of *London* for 5649 *l.* 9 *s.* 7 *d.* ¼, being the Surplus of his Personal Estate; and now the Plaintiffs having attained their full Age, being about 13 Years after the Testator's Death, brought this Bill against the Defendant and his Wife, who was the Widow and Executrix of the Plaintiff's Father, for an Account of his Personal Estate, and to have their several Legacies paid them; the Defendants by Answer insisted, that the Husband, the Plaintiff's Father, being a Freeman of *London*, she was intitled to her Third Part, as his Widow, by the Custom, and whether she should be allowed it or not, was the principal Point.

For the Plaintiffs it was argued, that the Husband being a Freeman of *London* at the Time of his making this Settlement, must be supposed to have in his View, and under his Consideration the making of such Settlement as a Freeman could make, which considered as such, could be only of his Personal Estate; and with Regard to the Influence he must be supposed to know the Custom would have over it at his Death, when the Settlement on his Wife was to take Place; that this was the stronger, in Regard it did not appear, that he had any Real Estate whatsoever at the making this Settlement; and therefore it was so far a diminution and lessening of his Personal Estate, to make this Provision for his Wife, which ought to be looked upon as a compounding with her for any Customary Share thereout; and it was said, that this differed in that Respect from the Case of *Atkins* and *Waterson*, where it appeared, that the Husband at the Time of the Marriage had a Real Estate, and made a Settlement thereof on his Wife, and therefore, there nothing was taken out of his Personal Estate, as there is in this Case, and cited the Case of *Hancock* and *Hancock*, where a Man covenanted to lay out a Sum of Money in the Purchase of Lands to be settled on his Wife for her Jointure, and in bar of Dower; and after the Marriage, he purchased a Leasehold Estate only, and settled it accordingly, and this was decreed, and afterwards affirmed on a Rehearing to be a Bar of the Wife's Customary Share.

But it was argued on the other Side, that this Settlement was only, that the Wife might be sure of some Provision in all Events; that the Custom did not operate on the Personal Estate, 'till the Freeman's Death; that if he should the very Day before his Death have laid out his whole Personal Estate in the Purchase of Lands, and declare expresly, that it was to prevent the Custom operating upon it, that in that Case the Wife would be without Remedy; that therefore since it continued Personal

Eſtate to the Time of his Death, ſhe ought to have the Benefit of it; that immediately upon theſe Articles the Money was to be ſo far looked upon as Land, that it muſt go to the Wife and Iſſue accordingly; that if a Purchaſe had not been made, they might have brought a Bill in this Court to have compelled it, that it was no Ways relative to the Perſonal Eſtate, and therefore could be no Bar to any Share coming out of the Perſonal Eſtate; that it might as well be pretended to be a Bar of the Share on the Statute of Diſtributions, if the Huſband ſhould die Inteſtate, where he was not a Freeman; that Real and Perſonal Eſtate were of two different Kinds, and a Proviſion out of one had no Relation to the other; that in the Caſe of *Atkins* and *Waterſon* it was clearly decreed to be no Bar; and tho' that was a Settlement of Lands, that could make no Difference; for the Money in this Caſe, as ſoon as the Articles were executed, was to be looked on as Land too; and Mr. *Vernon* cited a Caſe of *Platt* and *Stanton*, where it was decreed by my Lord Chancellor *Cowper* in *Mich.* Term 1717; that a Proviſion for a Child on her Marriage by a Freeman, was no Bar to any future Share ſhe might be intitled to by the Cuſtom, no more than it would be to her taking by Deſcent, or Deviſe.

Lord *Chancellor* was clear of this Opinion, that from the Time of the Articles, the Money was a Debt which the Huſband was obliged to pay, that it was no Part of his Perſonal Eſtate from that Time, but muſt be looked upon as Land, and then it could be no Bar of her Cuſtomary Share of the Perſonal Eſtate, that the Cuſtom did not operate at all 'till the Party's Death; and then whatever Perſonal Eſtate was left, was to go according to it.

There was another Point in this Caſe, Whether the Wife ſhould take any Benefit at all by the Will, ſince now ſhe thinks fit to claim by the Cuſtom; and a Caſe of *Langſton* verſus *Langſton* was cited, that ſhe ought

3 not,

not, that ſhe ought wholly to adhere to the Will, or wholly to the Cuſtom.

But my Lord *Chancellor* ſeemed to be clear, that if the Will no Ways interfered with the Cuſtom, but that there was ſufficient, over and above what was given to the Wife, to anſwer her Cuſtomary Part, and the Children's, that ſhe might well take, for he might give his own Teſtamentary Part, as he thought fit, and to ſay, that the Wife ſhould be excluded in that Caſe from taking any Part of the Teſtamentary Share deviſed to her, would be to ſay, that he had a Power of diſpoſing a Third Part to any Body, provided it were not to his Wife and Children, which would be abſurd and monſtrous; but it being urged, that there were abundance of Precedents to the contrary, it was directed, that they ſhould be ſearched before any Determination given on this Point, and yet it ſeems not at all unreaſonable, that the Wife having in all Events ſecured herſelf of a Proviſion, and of a Proviſion too out of the Perſonal Eſtate, and that before Marriage, in Reſpect of which the Husband is bound, ſo that whatever Accidents or Misfortunes befal him, he has no Power or Controul over that, not for the Payment of Debts, Proviſion for Children, or any other Emergency whatſoever; that upon theſe Conſiderations, the reſt of the Perſonal Eſtate ſhould be looked upon to be entirely free and exempt from the Cuſtom, and the rather, for that if a Man before Marriage ſettles a Jointure out of Lands, be it never ſo ſmall, it will totally bar the Wife to claim any further Jointure, or to have Dower out of her Husband's Eſtate, tho' it ſhould be increaſed to many Thouſands a Year at his Death, and why, therefore, ſhould not this Proviſion out of the Perſonal Eſtate bar her likewiſe to claim any further Share thereout.

Note, It came on after, on the Maſter's Report, when the Lord *Chancellor* decreed the Teſtamentary Third to go

go towards the making up the Plaintiffs, their Legacies 3000 *l.* apiece, by Virtue of the Devise of the Residuum to them; but decreed the Plate and Furniture to the Wife, by Virtue of the said Will, tho' she had rejected the said Will as to her Customary Share, which was compared to *Fox* cont' *Edmondson*, where in such Case she was even debarred of any Freehold Estate given her by the said Will, and so *Kilson* cont' *Kilson*, and other Cases.

3

DE

Termino S. Hillarii, 1718.

In Curia Cancellariæ.

Coleman versus *Wince*.

Case 316. 7 *February*. In Court Ld *Macclesfield*. A Man Mortgages Lands, and after borrows more Money of the Mortgagee on Bond, the Alinee of the Heir of the Mortgagor not obliged to pay both the Mortgage Money and the Bond Debt.

THE principal Question in this Case was, Whether on a Bill brought by the Purchasor of Lands from the Heir at Law of the Mortgagor to redeem the Mortgagee, could retain a Bond Debt of the Mortgagor to his Mortgagee, so as to oblige the Purchasor to pay both, before he redeemed, as without Question he might have done upon such a Bill brought by the Heir at Law of the Mortgagor before any Sale made.

And it was argued, that he might, because the Purchasor deriving under the Heir, and standing in his Place could not be in a better Condition than he himself would have been, if he had been Plaintiff, and had brought this Bill; and especially since, by the Statute against fraudulent Devises, the Creditor is at Liberty to follow the Lands in the Hands of the Devisee, as well as against the Heir himself, and the Alienation in this Case was meerly voluntary, and the Mortgage forfeited at Law.

But it was held by my Lord *Chancellor*, and decreed accordingly, that the Alienee of the Heir might redeem the Mortgage, without paying the Bond Debt; for tho' it is true, that the Heir muſt have paid both in ſuch a Caſe, yet the Reaſon of that is, becauſe the Heir is expreſly bound, and it is his own Debt, ſo that the Action upon the Bond is brought againſt him in the *debet* and *detinet*; and tho' by the Civil Law he may ſubſtitute the Lands which he had by Deſcent, in Diſcharge of his Perſon, yet he may, if he thinks fit, diſpoſe of thoſe Lands, and make his Perſon liable; but by our Law, before the Statute if *Riens per Deſcent* were pleaded, the Plaintiff could only reply, that he had Aſſets by Deſcent, at the Time of the Writ purchaſed; for if he had diſpoſed of them before, the Plaintiff had no Remedy; but now by the Statute, the Plaintiff may reply, that he had Aſſets by Deſcent before the Writ purchaſed at ſuch a Time, and if found for him, he ſhall have Execution in Value againſt the Heir, which before he could not have; but he can no more follow the Lands in the Hands of the Alienee, than he can the Goods in the Hands of the Vendee of the Executor, for the Perſon of the Heir is Debtor, and not the Lands, and conſequently the Lands in the Hands of the Alienee can be charged with nothing but what is an immediate *Lien* thereon, which the Bond is not; tho' the Lands in the Hands of the Heir himſelf ſhall be liable in this Caſe, to pay both the Bond and Mortgage, on a Bill brought by the Heir for a Redemption.

So if a Man poſſeſſed of a Term for Years, mortgages it, and dies indebted to the Mortgagee in a Bond Debt; if the Executor brings a Bill to redeem, he muſt pay both, becauſe the Equity of Redemption of the Term is Aſſets in his Hands; but if he alien the Equity of Redemption of this Term, tho' he ſhall be anſwerable for the Value, as it is ſo far a *Devaſtavit*; yet the Purchaſor ſhall be charged with no more than was immediately

borrowed upon it; and it was alſo held in this Caſe, that the Bond Creditor of the Heir himſelf ſhall be preferred before a Bond Creditor of his Anceſtor, after ſuch Alienation made, whether it were voluntary, or for a valuable Conſideration.

DE
Termino Paſchæ,
1719.
In Curia Cancellariæ.

Hawkins verſus *Turner*.

Caſe 317. *May* 4. In Court Ld *Macclesfield.* Tho' Bonds of Reſignation are not prohibited by Law; yet if they are made Uſe of to extort Money from the Incumbent, or to turn him out for any Thing but ill Behaviour, or Immorality, Equity will grant an Injunction againſt them.

IN this Caſe it was agreed, that a Bond given to reſign on Requeſt, ſhould not be made Uſe of to turn out the Incumbent, unleſs for Non-Reſidence, or ſome great Miſdemeanor; nor would the Ordinary accept of a Reſignation offered by the Incumbent, without ſome ſuch Cauſe ſhown; but if the Patron made Uſe of the Bond to extort Money from the Incumbent, without ſome ſuch Cauſe ſhown, this Court would grant an Injunction; and a Caſe of one *Sands* of *Glouceſterſhire* was cited, and alſo of *Wood* and *Lumly*, before Mr. Juſtice *Blencow*, lately in the Abſence of the *Chancellor*, where, tho' the Patron had taken a Bond to reſign, when his Son ſhould

ſhould be in Orders, and qualified; yet having made an ill Uſe of the Bond ſome Time before, the Court would not ſuffer him to proceed upon it at Law, tho' they ſeemed all to agree, that theſe Bonds were not prohibited by the Law, ſo far as they were made Uſe of, only to keep the Incumbent to Reſidence and good Behaviour, and to diſcourage Immorality.

Caſe 318.

Harkneſs verſus *Bayley*.

Lands deviſed to one in Fee, and afterwards mortgaged to the ſame Perſon, is a Revocation *in toto*; but if mortgaged to a Stranger a Revocation *quoad* the Mortgage only.

RIchard Bayley being poſſeſſed by Way of Mortgage of the Remainder of a forfeited Term for 2000 Years, of Lands in *Norfolk*, by his Will in 1675, deviſes 1500 *l.* apiece to his three younger Children, and the like Sum to the Child his Wife was then enſient with; and if any of his Children died before 18, or Marriage, their Shares to go to the Survivors or Survivor of them, and gave the Reſidue of his Eſtate after the Payment of his Debts and Legacies, to his Wife *Priſcilla*, and made her ſole Executrix, and died; his Wife was afterwards delivered of a Daughter, who together with two of the other three Children, all died under Eighteen, and unmarried, and the Defendant was the only ſurviving Daughter.

Priſcilla the Mother, after her Huſband's Death Purchaſes the Inheritance and Equity of Redemption of theſe Lands, in the Name of *William Bayley* her Son, in Truſt for her and her Heirs; and this Inheritance was afterwards convey'd to another, in Truſt for the Mother and her Heirs, who afterwards took a Conveyance of the Inheritance to herſelf, by which the Inheritance ſeemed to be merged; then the Mother makes her Will, 6th of *June* 1710, and thereby deviſes theſe Lands to the Defendant her Daughter, and her Heirs; and afterwards for ſecuring 4000 *l.* to the Defendant, wherein ſhe ſtood indebted to her, for her own, and her three Siſters Legacies, and Intereſt, and wherewith thoſe

3 Lands

Lands by the Father's Will were chargeable in the Mother's Hands; the Mother, together with her Son *William Bayley*, join in a Mortgage of these Lands to the Defendant the Daughter for 500 Years, with a Proviso to be void, on Payment of 100 *l. per Ann.* to the Daughter, during her Mother's Life, and the 4000 *l.* and Interest within three Months after her Death.

The Defendant the Daughter never executed this Mortgage, or any Counterpart thereof; this Mortgage was made the 29th of *September* 1711, and the Mother died the 18th of *March* 1712, *William Bayley* the Brother, being indebted to the Plaintiffs in several Sums of Money due to them by Bonds, makes his Will, and thereby devises all his Real and Personal Estate, after his Debts paid, to the Defendant his Sister, and her Heirs and Assigns for ever, and there being a Deficiency of Personal Assets to satisfy their Debts,

The Plaintiffs brought this Bill to subject these Lands to a Sale, for Satisfaction of their Debts, and the only Question was, Whether this Mortgage for 500 Years to the Daughter, were a Revocation of the Devise thereof in Fee to her, by her Mother's Will? For if so, then the Inheritance and Equity of Redemption subject to that Mortgage descended to *William Bayley*, and by consequence was well subjected by his Will to the Payment of his Debts; or if this Mortgage should only be a Revocation *quoad* the Term Mortgage, and the Inheritance and Equity of Redemption continue well devised to the Daughter, by her Mother's Will, as it was urged it ought; and that the Mother's Intention in making this Mortgage to her, was only with Design to secure the 4000 *l.* she stood indebted to her, not to revoke the Devise thereof to her in Fee.

But it was decreed to be a Revocation of the Devise in Fee, being made to some Person, and therefore Inconsistent with the Devise, as *Cro. Car.* 49. *Cook* and *Bullock*'s Case, tho' agreed, if the Mortgage had been made

to a Stranger, it had only been a Revocation *quoad* the Mortgage, and the Defendant was decreed to account for the Profits from her Mother's Death.

Case 319. In Court Ld *Macclesfield*. A Lessor suffers the Lessee to hold the Lands after the Lease is determined, Equity won't compel the Tenant to Account for the Mesne Profits, unless the Lessor was hindred from entring, by Fraud or some extraordinary Accident.

Duke of *Bolton* versus *Deane*.

IN this Case a Lease had been made by some of the Duke's Anceſtors, under whom he claimed, to one *James Deane*, for the Life of himself, and of *Anne* and *Elizabeth* his two Daughters, and the Life of the longer liver of them; upon *Deane*'s Intermarriage with the Defendant his second Wife, these Lands were settled on her by Way of Jointure for her Life, and they had Issue a Daughter, who was likewise named *Elizabeth*; then *James Deane* died, and afterwards his two Daughters, being the two remaining Lives in the Lease, died likewise, whereby in strictness of Law that Lease was at an End; but there being still a Daughter named *Elizabeth* alive, the Duke's Ancestors, or the Duke, made no Entry, but concluded the Lease was still subsisting, and the Defendant had held these Lands under this mistaken Title for several Years; but now, very lately, upon an Inspection into the Lease, the Mistake being discovered, the Defendant acquainted the Duke with it, and he had Possession delivered to him, and now brought this Bill for an Account of the Rents and Profits from the Time of the Determination of the Lease.

Lord *Chancellor* was clear of Opinion, that where one has Title of Entry, and neglects to enter, or to bring his Ejectment, but sleeps upon it for several Years; that as he has no Remedy at Law for the Mesne Profits, so neither has he in Equity, for it was his own Fault he did not enter, and he shall never come into a Court of Equity for Relief against his own Negligence, or to make the Tenant in Possession, who held over his Lease, to be but his Bailiff or Steward, whether he will or not; but in the present Case, by Reason of this Circumstance

of both Daughters being of the ſame Name, and the Miſtake conſequent thereupon, the Defendant was decreed to Account for the Meſne Profits from the Time of the Expiration of the Leaſe, and ſo it would be where any Fraud had been uſed to conceal the Title from the Leſſor, or in Caſe of an Infant; but otherwiſe generally, where the Party has no Remedy at Law, he ſhall have no Relief in Equity for the Meſne Profits, but from the Time of an Entry made, which he at his Peril ought to have taken Care of ſo ſoon as his Title began.

DE
Term. S. Trinitatis,
1719.
In Curia Cancellariæ.

Lockey verfus *Lockey*.

Cafe 320. In Court Ld *Macclesfield*. An Infant who neglects to enter fix Years after he comes of Age is as much barred by the Statute of Limitations from bringing a Bill for an Account of Profits, as he is from an Action of Account at Common Law.

IN this Cafe my Lord *Chancellor* was clear of Opinion, that where one receives the Profits of an Infant's Eftate, and fix Years after his coming of Age he brings a Bill for an Account, that the Statute of Limitations is a Bar to fuch Suit, as it would be to an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Eftate, is not fuch a Truft, as being a Creature of a Court of Equity, the Statute fhall be no Bar to, for he might have had his Action of Account againft him at Law, and therefore no Neceffity to come into this Court for the Account; but the Reafon why fuch Bills are brought here, is from the Nature of the Demand, that they might have the Difcovery of Books, Papers, and the Parties Oath, for the more eafy taking of the Account, which they cannot fo well do at Law; but if the Infant lies by for fix Years, after he comes of Age, as he is barred of his Action of Account at Law, fo fhall he be of his Remedy in this Court; and there is no Sort of Difference in Reafon between the two Cafes.

Another Point was, Whether an Agreement not in Writing being executed on one Part, and an Enjoyment accordingly, whether this could be so far impeached as to lay the Party open to an Account for the Profits he had received under this Enjoyment; and the Court was clear of Opinion he should not, for this would be much harder than setting aside the Agreement at first for want of Writing, which yet, if executed on one Part, had been always looked upon so far conclusive, as to induce the Court to decree an Execution on the other Part, not to destroy or avoid the Agreement, so far as it was already carried into Execution; and therefore in *Leicester* and *Foxcroft*, could the Party who had built upon the Ground, if he had enjoy'd the Houses for several Years have been liable as a wrong Doer, to account for the Rents and Profits, for want of the Agreement's being reduced into Writing, most certainly he should not.

An Agreement, tho' not in Writing, being executed on one Part, and an Enjoyment accordingly, Equity won't destroy or avoid long as it has been already carried into Execution.

DE
Termino S. Mich.
1719.
IN CURIA CANCELLARIÆ.

Case 321. **Brunsden versus Stratton.**

A Settlement made after Marriage on the Wife and Children, pursuant to Articles entred into previous to the Marriage, tho' not exactly agreeing with them, not voluntary nor fraudulent against Bond Creditors.

ON the Marriage of the Defendant, her intended Husband being under Age, and so incapable of making a Settlement, the Wife's Father gave a Bond for the Payment of 1500 *l.* on his making a suitable Jointure-Settlement on her, without taking any Notice whatsoever of the Issue; the Marriage took Effect, and the Husband some Years after, on Payment of the 1500 *l.* made a Settlement of 147 *l. per Ann.* or thereabouts, on himself for Life, Remainder to his Wife for Life, for her Jointure, with Remainder to their first and other Sons, in the usual Form; the Plaintiffs were Bond Creditors of the Husband; and now after his Death brought this Bill against the Wife and Children, to set aside this Settlement, on Pretence the same was voluntary and fraudulent, being made after Marriage, especially as to the Children, for whom no Provision appeared to be made on the Treaty, previous to the Marriage, and that therefore the Plaintiffs ought to be let in for a Satisfaction of their Debts.

But the Master of the *Rolls* was clear in Opinion, that this was no fraudulent or voluntary Settlement,

 being

being but adequate to the Wife's Fortune, and that the Words of the Bond were capable of ſuch a Conſtruction, for that a Jointure Settlement muſt be intended a Settlement in the Common Form, to the Iſſue, and a Jointure for the Wife.

And Mr. *Vernon* ſaid, there could be little Doubt of this, ſince the Caſe of *Parſlowe* and *Weedon*, *Trin.* 1718, where it was held, that tho' ſince the Statute againſt fraudulent Deviſes, a Man could not by Will Deviſe his Eſtate to defeat his Bond Creditors, yet any Settlement or Diſpoſition he ſhould make in his Life Time, whether voluntary or not voluntary, would be good againſt Bond Creditors; for that was not provided againſt by the Statute, which only took Care to ſecure ſuch Creditors againſt any Impoſition, which might be ſuppoſed in a Man's laſt Sickneſs; but if he gave away his Eſtate in his Life Time, this prevented the Deſcent of ſo much to the Heir, and conſequently took away their Remedy againſt him, who was only liable in Reſpect of the Lands deſcended; and a Bond was no Lien whatſoever on the Lands in his own Hands; and if he might give them away to a Stranger, much leſs can this Settlement on his Wife and Children be deemed voluntary or fraudulent, as to ſuch Creditors, tho' he ſaid, that 'till that Reſolution, he ſhould have been of another Opinion; and that ſuch a Diſpoſition had been held fraudulent againſt Creditors, in the Caſe of *Templeman* and *Beke* tried before my Lord Chief Juſtice *Holt*, ſo the Plaintiff's Bill was diſmiſſed in this Caſe.

It was likewiſe ſaid by Mr. *Vernon*, that before my Lord *Nottingham*'s Time, it was held, that where Lands were deviſed to be ſold for the Payment of Debts and Legacies, that both ſhould be paid *Pari Paſſu*, but he held that the Debts ought to have a Preference, for that, as he ſaid, he would not make a Man Sin in his Grave, and ſo it has been held ſince, that the Debts in ſuch Caſe ſhall have a Preference in Payment.

Case 322.

Turton versus *Benson*.

A Bond obtained in Fraud of a Marriage Agreement, tho' afterwards assigned to a Creditor for a just Debt, shall be set aside in Equity.

THIS was an Appeal from the *Rolls*, and was but this: The Plaintiff on his Marriage with the Daughter of Mr. *Benson*, was to have 3000 *l.* Fortune; but the Plaintiff's Mother being living, so that he could make no Settlement without her Concurrence, she in Consideration of the Marriage and Portion joined in making a Settlement adequate to the Fortune; but before the Marriage Mr. *Benson* expressing his Inability to give such a Fortune with his Daughter, having other Children to provide for; Mr. *Turton* and he came to an Agreement between themselves, that to induce the Mother to join in making the Settlement, the Portion should be mentioned to be 3000 *l.* but that *Turton* should give him a Bond to pay him back 1000 *l.* of it at the End of seven Years; and that in the mean Time he should have it without Interest; and accordingly a Bond was given the 29th of *July* 1710, and then the Settlement was made, and the Marriage proceeded before the End of the seven Years. Mr. *Benson* became greatly indebted to the Amount of 10 or 12000 *l.* and then died, and the Defendant his Widow took out Administration, and enter'd into an Agreement with several of the Creditors for the Assignment of this Bond amongst other Securities, towards Satisfaction of their Debts; and it appeared plainly in the Cause, that Mr. *Turton* was privy to, and knew of this Assignment; but now brought this Bill, to be relieved against the Bond, and to have it delivered up as obtained from him in Fraud of the Marriage Contract; and after the Treaty had been agreed to, and a suitable Settlement provided for the Lady.

The Creditors who had obtained the Assignment of this Bond, they likewise brought their Bill to have the Agreement executed, and that they might be at Liberty to proceed in the Name of the Administratrix, for Recovery of the Money due on this Bond, and insisted,

that whatever Consideration the Bond might have had, whilst it continued in Mr. *Benson*'s Hands, or in the Hands of his Representative, yet now being assigned to them, and they being just and honest Creditors, ought to have the Benefit of it; that whatever Fraud may be supposed in the obtaining of it, yet it being now assigned to them on so just and valuable a Consideration as the Payment of their Debts, that had purged the Fraud, and would make good the Assignment.

That tho' the legal Interest in this Bond could not be assigned to them, being a *Chose* in Action, yet by the Assignment the Administratrix was become a Trustee in Equity for them, and therefore they ought to be at Liberty to make Use of their Trustees Name at Law for Recovery of the Money due thereon; and it was likened to the Case, where a Man purchases an Estate of *A.* to which *B.* has Right, and he has Notice of it, this Notice will affect his Purchase, notwithstanding any Conveyance; but if he after sells this Estate to another Person, who has no Notice of *B*'s Right, this second Purchasor without Notice shall not be affected by it; but *B.* must take his Remedy as well as he can against *A.* but to make that Case more directly applicable to the present Case, it was urged farther, that if the first Purchasor had sold it to the second, and only given him a Declaration of Trust, so that the legal Estate continued still in him, yet it was said there was no Case could be produced, wherein Relief had been given against the second Purchasor in such Case; that indeed, if the second Purchasor has a Conveyance of the legal Estate, he has them both in Law and Equity, as he has no Notice, and this shall prevail against *B*'s bare Equity; but even where there is no Conveyance, yet it was urged, that his Equity should be preferred to *B*'s being without Notice.

On the other Side it was urged, that this Bond was a meer *Chose* in Action; that it was not assignable at Law; and that notwithstanding any Assignment, yet the legal Interest and Property continued in Mr. *Benson* and his

Repreſentatives; that therefore the Creditors could not be in a better Condition than he himſelf was; that if Mr. *Turton* had Title to be relieved, whilſt it continued in his Hands, the Aſſignment could not take it away from him, or make his Caſe at all the worſe; and a Caſe was put by Mr. *Vernon*, where a Man agreed to ſell his Copyhold Lands, and made a Surrender out of Court for that Purpoſe; but the Surrender not being preſented within the Year, according to the Cuſtom, became ineffectual; and in the mean Time, the Perſon who ſold becoming a Bankrupt, his Creditors inſiſted, that for want of an effectual Surrender, the legal Eſtate continued in the Bankrupt, and therefore ought to be ſubject to their Debts; and the rather, for that they being juſt Creditors, as well as the Purchaſor, had the Advantage of Weight on their Side, by having the legal Eſtate; but on a Hearing and Rehearing by Lord Chancellor *Cowper*, it was decreed, that the Creditors could not be in a better Condition than the Bankrupt himſelf was; that as he might have been compelled to have made good this Agreement with the Purchaſor, and to have made an effectual Surrender, ſo muſt his Creditors, who ſtand in his Place and derive under him.

Lord *Chancellor*. Bonds of this Kind given in Fraud of Marriage-Contracts, are never to be favoured in a Court of Equity; that the Relief ſought here againſt the Bond, is by the Party himſelf, who was privy to the Fraud, is nothing at all to the Purpoſe, for ſo it is in all Caſes of this Nature, and can be by none but the Parties concerned; that here Mr. *Turton*'s Mother was plainly impoſed on to conſent to join in a Settlement for 3000 *l.* which, if this Bond ſhould prevail, would ſink a third Part of the Fortune; that this Fraud affected the Land *ab initio*, and the Aſſignment to Creditors cannot mend the Caſe, for they can be in no better a Condition than the Party himſelf, who aſſigned that Bond; that if an Aſſignment to Creditors would alter the Caſe, it would entirely put an End to all Applications for Relief in this

Court; that it would then be only to assign such a Bond as this to just Creditors, and all would be safe; that the Creditors having no Notice of the Consideration of giving this Bond, would not at all help them, for suppose the Bond had been a good one, but Part of the Money paid, and then it had been assigned, as if the whole Money had been still due on it, would this affect the Obligor? No more, in this Case, if the Bond was liable to be set aside, whilst it continued in the Obligees Hand, his Assignment of it will not alter it, tho' the Assignees have no Notice of the Nature of it; for an Assignment of a Bond is but an Agreement, that the Assignee shall have the Benefit of all Money to be recovered thereon; and if none were due, or that the Bond were obtained on an unlawful Consideration, no Assignment whatsoever can make it better. I think the Decree at the *Rolls* was exceeding right, let the Bond be delivered up, and a perpetual Injunction against it.

Note, In this Case were cited, 1 *Salk.* 156, *Kemp* and *Coleman*, the Case of Duke *Hamilton* and Lord *Mohun*; and Mr. *Vernon* cited the Case of *Redman* and *Redman*, where the Husband being considerably indebted before Marriage, prevails with his Brother to give Bond for the Payment thereof to the several Creditors, and gives him his own Bond as a counter Security; the Husband dies, and the Brother being forced to pay these Debts, put his counter Bond in Suit against the Widow and Administratrix, but she was relieved against it in this Court. Another Case cited by him was of *Gale* and *Lendo*, where the Woman's Fortune falling short of what was expected, and she being desirous the Match should go on, prevails on her Brother to give her a Bond for so much as was wanted, the Marriage proceeds, the Husband dies, and she took out Administration, and put the Bond in Suit against her Brother, and tho' she herself was Party to the Fraud, yet the Brother was forced to pay the Money, and could have no Relief in this Court.

Sir

Case 323. Sir *George Maxwell* versus Lady *Mountacute* his Wife.

20 *Novemb.* At my Lord *Chancellor's* House.

IN this Case a Distinction was taken and agreed by the Court, that where on a Treaty for a Marriage, or any other Treaty, the Parties come to an Agreement; but the same is never reduced into Writing, nor any Proposal made for that Purpose, so that they rely wholly on their Parol Agreement; that unless this be executed in Part, neither Party can compel the other to a Specifick Performance, for that the Statute of *Frauds* is directly in their Way; but if there were any Agreement for reducing the same into Writing, and that is prevented by the Fraud and Practice of the other Party, that this Court will in such Case give Relief; as where Instructions are given, and Preparations made for the drawing of a Marriage Settlement, and before the compleating of it, the Woman is drawn by the Assurances and Promises of the Man to perform it, and after to marry him.

So where a Man treated to lend Money on a Mortgage, and the Conveyance proposed, was an absolute Deed from the Mortgagor, and a Deed of Defeasance from the Mortgagee, and after the Mortgagee had got the Conveyance, he refused to execute the Defeasance; yet my Lord *Nottingham* decreed it against him on the Fraud after the Statute.

So where an absolute Conveyance is made for such a Sum of Money, and the Person to whom it was made, instead of entring and receiving the Profits, demands Interest for his Money, and has it paid him, this will be admitted to explain the Nature of the Conveyance, and a Letter has been held a sufficient Agreement in Writing, if it were signed by the Party, to bring it out of the Statute, and cited the Case of *Leicester* and *Foxcroft*, and other Cases.

DE
Termino S. Hillarii,
1719.
In Curia Cancellariæ.

Woodroff verſus *Wickworth*. Caſe 324.

IN this Caſe it was clearly agreed, that the Grandmother was next of Kin, and entitled to the Grandchild's Perſonal Eſtate, in Excluſion of the Uncles and Aunts; and ſo it has been before ſettled in a Caſe of *Welſh* and *Duppa*; and in the Caſe of *Blackborough* and *Davies*, 1 *Salk*, and ſo was now again reſolved in the principal Caſe.

The Grandmother is intitled to a Diſtribution of the Grandchild's Perſonal Eſtate in Excluſion of the Uncles and Aunts.

But whether Executors ſhould have the Surplus of the Perſonal Eſtate to their own Uſe, or in Truſt for the next of Kin; Mr. *Vernon* ſaid nothing was at preſent more looſe and unſettled.

DE
Termino Paschæ,
1719.
In Curia Cancellariæ.

Case 325.

Nicholls versus *Skinner*.

At the *Rolls*.

A. devises Portions to his four Children, payable at their Respective Ages of 21 Years or Marriage; and in Case any of them should die before the Time of Payment, or should die without Issue, then his or their Share to the Survivors or Survivors of them. One of them died under Age, and without Issue this, tho' a Limitation of a Personal Estate, is good; but liable to the Contingency of Survivorship, 'till it comes to the last of the four Children.

THE Plaintiff's Father having four Children, and being possessed of 2000 *l.* in the *Bank-Stock*, and of other Personal Estate, makes his Will, and thereby devises Portions to his said Children to be paid, and payable to them at their respective Ages of 21 Years, or Days of Marriage, which should first happen; and in Case any of them should die before the Time of Payment, or should die without Issue, then his or their Share to go to the Survivors, and Survivor of them, and his Heirs. One of them died without Issue under Age, and unmarried, and the Plaintiff, who was one of the surviving Brothers, and married, tho' under Age, brought this Bill for a third Part of the dead Brother's Share, and the Questions were,

1*st*, Whether upon this Will the Devise in Case of Death without Issue being of a Personal Estate were good? 2*dly*, Whether admitting it were, the dead Brother's Share were not still liable to the Contingency of Survivorship, 'till it came to the last of the four Brothers?

His *Honor* was of Opinion, and decreed accordingly, that in this Cafe the Limitation being to the Survivors and Survivor of them, and his Heirs, that it could not be intended a dying without Iffue generally, which would make it void; but a dying without Iffue in fuch Manner, as that the Survivors or Survivor might take it, which muft be during their Lives, and confequently good. 2*dly*, That it was liable to the Contingency of furviving, 'till it came to the laft, and confequently the now Plaintiff could not have his Share of the Principal of his dead Brother; but in Regard no Direction was given in the Will concerning the Intereft, it was decreed he fhould have a proportionable Part of the Intereft during his Life, elfe the Intereft likewife muft lie dead 'till it come to the laft, which would be very inconvenient; tho' in Cafes not fo circumftanced the Legatee has not been allowed the Arrears, or growing Intereft, for want of a Direction in the Will concerning it; but it has fallen into the *Refiduum* of the Teftator's Perfonal Eftate.

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DE
Term. S. Trinitatis,
1720.
In Curia Cancellariæ.

Case 326.

Bush versus *Western*.

A Man who has been in Possession of a Water-Course 60 Years, may bring a Bill against a Mortgagee, who foreclosed the Equity of Redemption to be quieted in his Possession, altho' he had not established his Right at Law.

THE Plaintiffs had been in Possession of a Water Course upwards of 60 Years, the Defendant claimed the Land thro' which the Water-Course ran, by Virtue of a forfeited Mortgage for 100 Years, and which he had obtained a Decree to foreclose; the Plaintiff's Title was fully proved, and the Bill was for a perpetual Injunction to quiet the Plaintiff's Possession, which the Defendant had interrupted, by making a Cut or Channel thro' his own Lands, and setting up a Sluice at the Mouth thereof, whereby the Water that should have ran to the Plaintiff's Water-Course was totally diverted and prevented.

And tho' it was objected, that if the Plaintiff had any Damages, his Remedy was purely at Law, and that they ought not to come hither, 'till they had established their Title at Law.

2dly, That if they could, yet they ought to have brought those who had the Inheritance of the Lands thro' which the Water-Course ran, before the Court, and that it was not sufficient to have only the Mortgagee.

Yet

Yet the Court decreed for the Plaintiff, and agreed it usual to have such Bills in the first Instance in this Court; and cited Lord *Aylesford's* Case lately, and some others; and if the Defendant would have had the Remainder-Man a Party, he ought in his Answer to have shewn who that was, that he had only a Term for Years, and pray'd that he might have been made a Party; but this he had not done, but insisted on his own Title under the foreclosed Mortgage; and therefore that Objection was over-ruled.

Duke of *Dorset* versus Serjeant *Girdler*. Case 327.

A Man who is in Possession of a Fishery, may bring a Bill to examine his Witnesses *in Perpetuam rei Memoriam*, and establish his Right, tho' he has not recovered in Affirmance of it at Law, *secus*, if he is not in Possession.

THIS was a Bill brought for a Commission to examine his Witnesses *in Perpetuam rei Memoriam*, to establish his sole Right of Fishery; and it was suggested in the Bill, that the Defendant pretended a sole Right of Fishery, and threatned to bring Actions, and disturb the Plaintiff when all his Witnesses should be dead.

To this Bill the Defendant demurred, for that the Plaintiff had not verified his Title at Law, and therefore had no Right to bring his Bill in the first Instance; but the Demurrer was over-ruled, and this Difference was taken and agreed to by the Court.

That if one is out of Possession, having only right to Fishery, Common Rent Charge; he who brings such Bill ought never to be allowed, but a Demurrer to it will be good, because he may and ought first to enter his Action, and establish his Title at Law, otherwise Publication not being to pass 'till after the Death of the Witnesses (as in those Cases it never does, without special Order of the Court) they may be guilty of the grossest Perjury, and yet go unpunished; besides, that the Party having a Remedy at Law, the other Side ought not to be deprived of the Opportunity of confronting the Witnesses, and examining them publickly, which has

always been found the moſt effectual Method for diſcovering of the Truth.

But if a Man is in actual Poſſeſſion, and is only threatned with Diſturbances by another, who pretends a Right, he has no other Way in the World to perpetuate the Teſtimony of his Witneſſes, but by ſuch a Bill as this is, for not being actually interrupted or diſturbed, he can bring no Action at Law; and in ſuch Caſe, if this Demurrer ſhould be allowed, there is an End of all Bills to perpetuate the Teſtimony of Witneſſes to Wills, and ſuch like, wherein the Parties pray no Relief, nor ought to do, but only a Commiſſion for the Examination of their Witneſſes; and yet even in theſe Caſes, if the Plaintiff ſhould afterwards be evicted or diſturbed, theſe Diſpoſitions cannot be made Uſe of ſo long as the Witneſſes are living, and may be had to be examined before a Jury.

But in the preſent Caſe, if the Defendant had not only threatned to diſturb the Plaintiff, but had actually diſturbed him by Fiſhing daily (as it was ſaid he did) he ought to have pleaded this; and that the Plaintiff ought therefore to ſeek his Remedy at Law, or if the Plaintiff had ſhewn in this Bill, that the Defendant had actuall diſturbed him by Fiſhing, then the Demurrer had been proper, but not for barely threatning.

That here he had by his Anſwer inſiſted on his Right of Fiſhery, and that he hoped to prove it, and for ſeveral other Matters diſcloſed in his Anſwer, he inſiſted on his Right thereto, and hoped to prove it; and yet by his Demurrer would debar the Plaintiff from proving any Thing at all; and a Caſe was cited between *Wynn* and *Hatty* before Lord Keeper *Wright*, at the *Inner-Temple-Hall*, where a Bill was brought of the ſame Nature touching a Common, and the Demurrer allowed, becauſe there it appeared of his own ſhewing, that he was interrupted and diſpoſſeſſed, and therefore had his Remedy at Law.

I

Muſſell

Mussell and *Cooke*.

Case 328.

A. agrees with B.'s Broker for 5000 l. *South-Sea* Stock, the Broker according to Usage made an Entry of this Agreement in his Pocket-Book, it being no otherwise reduced into Writing, is within the Statute of *Frauds*

THE 19th of *February* last, the Plaintiff agreed with one *Green* the Defendant's Broker, for 5000 *l. South-Sea* Stock, at 187 *l. per Cent.* to be delivered about ten Days after, and *Green* as the Usage is, made an Entry of this Agreement in his Pocket Book; at the Day appointed the Plaintiff attended at the Transfer-Office all Day with his Money, but the Defendant never came, and Stock being in the mean Time considerably risen, the Defendant refused to transfer it, whereupon in *April* following the Plaintiff brought this Bill for a Specifick Performance of the Agreement, Defendant pleaded the Statute of *Frauds* and *Perjuries*, that no Contract can be good, unless reduced into Writing.

And it was argued to be a good Plea, that if the Law-Makers were so careful, no Agreement for above 10 *l.* should be binding, unless reduced into Writing, much less ought this to be binding, which is for so much a greater Sum, and those Stocks were Personal Estates.

On the other Side it was said, that those were not at all within the Meaning of the Statute, that at the Time of making that Act, there was no other Stock in Being but the *East-India* Stock, and that only for about 300,000 *l.* which was lodged in a very few Hands, and but little of it sold or transferred; that this Entry or Memorandum of the Broker was the same Thing as if made by the Party himself, and by the Course and Usage in such Cases ought to be allowed a sufficient Evidence in Writing of the Agreement.

In pleading the Statute of *Frauds*, it is necessary to say, that the Agreement was not reduced into Writing

But my Lord *Chancellor* seemed to be of Opinion, that the Plea was good, and said, that it had been so held in many other Cases; but on looking into the Plea, he found, that he had barely pleaded the Statute, without adding, that this Agreement was not reduced into Writing, as he ought to have done, and so had not brought his Case within the Statute, and therefore the Plea was over-ruled. *Note,*

Note, In this Case, Mention was made of the Case of *Scould* versus *Butter* last Term, where on a Bill for a Specifick Performance of a Contract for *South-Sea* Stock, which was reduced into Writing, the Master of the *Rolls* decreed for the Plaintiff; but on an Appeal to the Lord *Chancellor*, the Decree was reversed, and the Party decreed only to pay the Difference, and that to do otherwise, might be the greatest Hardship and Injustice in the World, as the sudden Rise of Stock happened.

Case. 329.

Greenwood and *Brudnish*.

An Executor or Administrator paying away the Assets in satisfying Simple Contract Debts, can have no Relief in Equity against a Bond Debt, altho' they had no Notice of it.

IN *September* 1705, *John Sayer* made a Mortgage for 160 *l.* to one *Bishop*, the Defendant's Testator; in *October* 1711, *Sayer* died Intestate, and the Plaintiff without taking out Letters of Administration, possessed herself of his Personal Estate, and paid it all away in satisfying Debts on Simple Contract, *Bishop* died, having made his Will, and the Defendant's Executors who proved the same, and were in Possession of the mortgaged Premisses, after, in 1718, on looking into several old Papers and Writings, the Plaintiff found a Will of *William Sayer* the Grandfather of the Mortgagor, whereby these Lands were given to his Son in Tail, and on Search, no Fine or Recovery appeared to be levied, or suffered of those Lands; they were advised the Mortgage was not good, and in Consequence thereof, *John Sayer* the Plaintiff's eldest Son, by her first Husband, who was Heir in Tail, brought his Ejectment, and recovered Possession of the mortgaged Premisses, whereupon the Defendant being thus evicted, and having a Bond for Performance of Covenants in the Mortgage Deed, put it in Suit against the Plaintiffs.

And now this Bill was brought for an Injunction to stay the Defendant's Proceedings at Law, on Pretence that they had paid away all the Testator's Assets, before they had any Manner of Notice whatsoever of this Bond, and that the Defendant never gave them Notice of

it; and therefore they ought not to be chargeable with a Devastavit.

To this Bill the Defendants demurred, for that of their own ſhewing, it appeared, that Aſſets came to their own Hands, more than ſufficient to pay and ſatisfy this Bond; and that it alſo appeared by their own ſhewing, that they paid away theſe in ſatisfying Debts on Simple Contract, and of an inferior Nature; and that was to introduce a Courſe of Adminiſtration contrary to Common Law, and the Demurrer was held to be clearly good, and the Bill rejected as an Attempt to alter the Courſe of Law.

But if any extraordinary Fraud had been charged on the Defendants, by which the Plaintiffs had been deceived or induced to pay away the Aſſets, that might have varied the Caſe.

Clavering's Caſe.

Caſe 330.

A Receiver, to the Guardian of an Infant, who has his Accompt allowed him by the Guardian, ſhall not be obliged to Account over again to the Infant when he comes of Age.

THE Plaintiff was intitled to ſeveral Collieries of conſiderable Value, and his Guardians or Truſtees during his Minority, had appointed one of the Defendants to look after and manage the ſame, and alſo gave him a Sallary for ſo doing, which they had at Times increaſed or advanced, as they ſaw Occaſion. The Receiver or Manager for ſeveral Years paſſed his Accompts regularly with the Truſtees or Guardians every half Year, and they from Time to Time paſſed and allowed theſe Accompts.

The Plaintiff being now come of Age, brought this Bill, not only againſt the Truſtees, or Guardians, but alſo againſt the Receiver or Manager, to have a general Account of what had been received and paid, during his Infancy, or at leaſt, that he might be at Liberty to ſurcharge or ſatisfy the Accompts: The Defendant the Receiver pleaded the Accompts themſelves, and as to him the Plea was held clearly to be good, for that he was but Servant to the Guardians, or Truſtees; and as they had ſufficient Authority to employ him, they had the

ſame to diſcharge him, and allow his Accompts, and that he had nothing at all to do with the Plaintiff.

That if it were otherwiſe, none would ever be concerned in an Infant's Affairs; and his Plea ſhould be the rather allowed, for that the Plaintiff was at no Sort of Miſchief by it; he was at full Liberty to go thro' the whole Accompt againſt his Guardians, or Truſtees, and they only were reſponſible to him; and they were ſo far reſponſible, that if the Servant they employ'd, had embezilled or gone away with any Sum of Money whatſoever, they muſt have anſwered it to the Plaintiff, that the Receiver or Manager appointed by them, was meerly their Servant, and the Plaintiff had nothing at all to do with him, but muſt go on againſt his Guardians, or Truſtees, who were only and immediately anſwerable to him.

Caſe 331.
Eodem Die.

Anonymous.

When a Bill is exhibited for a general Diſcovery of Deeds, not neceſſary for the Plaintiff to annex the uſual Affidavit, that he has them not in his Cuſtody.

A Bill was brought for diſcovery of Writings, and the Defendant demurred, becauſe the Plaintiff had not annexed the uſual Affidavit, that he had none of them in his Cuſtody; but the Demurrer was over-ruled; and my Lord *Chancellor* ſaid, that if on ſuch a Bill as this was, it ſhould be allowed, it would overthrow half the Bills in this Court.

That the only Caſe where ſuch Affidavits were neceſſary was, where the Bill was for Diſcovery of a particular Bond ſuggeſted to be loſt, or for Diſcovery of a particular Deed, for want of which the Plaintiff could not recover his Debt at Law, or the Poſſeſſion in Ejectment; in theſe Caſes it is fit he ſhould make Oath, that he himſelf has not the Bond or Deed, becauſe if he had, his Remedy is proper and open at Law; and then he is not to put another to the unneceſſary Expence of an Anſwer to deny his having of it.

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Termino S. Mich.

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In Curia Cancellariæ.

Anonymous.

Case 332.

A City Orphan cannot by Will before 21 dispose of his Orphanage Part, so as to prevent Survivorship.

IN this Case were cited a Case of *Ambrose* versus *Ambrose*, and another of *Rawlinson* cont' *Rawlinson* where it had been certify'd to be the Custom of *London*, and was accordingly decreed by the Lord Chancellors *Harcourt* and *Cowper* successively; that if a City Orphan dies before 21, his Orphanage Part survives to the other Orphans; and that he can make no Disposition by Will to contradict it; but if he dies after 21, at which Time he might have by Will disposed of it there, tho' he die Intestate, it shall go according to the Statute of Distributions, between his Mother, and surviving Brothers and Sisters; and that in the other Case the Survivorship holds only as to the Orphanage Part belonging to himself; for that, if he had by Survivorship the Part of any other of his Brothers or Sisters, that should go according to the Statute of Distributions.

And it was also said, that if a Man married an Orphan, yet 'till 21 his Right was not so vested as to prevent his Wife's Share from surviving, in Case she died before 21, tho' whether the Marriage was before or after 21, the

the Husband was fineable, and might be committed, if he had not the Licence of the Court of Orphans.

Case 333. *Novemb.* 18. In Court Ld *Macclesfield*. A Court of Equity won't Decree a Specifick Execution of Articles, where they appear to be unreasonable, or founded on a Fraud.

Young versus *Clerk*.

THE Bill was to have a Specifick Execution of Articles, whereby the Defendant had agreed to let the Plaintiff a Lease of the Premisses for 18 Years, at the Rate of 67 *l.* 10 *s.* *per Ann.*

The Case was thus, the Plaintiff for about 20 Years last past had held the Premisses, as Tenant to one *Thomas Goodhew*, at the Rent of 40 *l.* *per Ann.* *Thomas Goodhew* was intitled to those Lands, under a Lease of 21 Years, with Power of a Reversal from the Archbishop of *Canterbury*; and on his Death, which happened about two Years since, the Estate came to *Henry Goodhew*, his Brother, by Virtue of a Family Settlement made the 20th of *December* 1689; and thereupon his Lease being determined, he applied to *Henry Goodhew* for a new Lease; but before a new Lease was made, he likewise died, having first made his Will, and thereby devised this Estate to his Daughter, with whom the Defendant after Intermarried, and thereby in her Right became intitled to the Premisses for the Residue of the Lease, with a Power of Reversal; and thereupon the Plaintiff applied to him likewise for a new Lease, to make up the compleat Term of 21 Years, which *Thomas Goodhew* had agreed with him for, and of which there was about 18 Years to come.

The Defendant had never seen the Land, nor knew nothing of the Nature or Value thereof, and therefore desired him to consider it, and come and see the Lands which lay near *Canterbury*, before he came to any Agreement concerning them; it appeared, and was fully proved in the Cause, that the Lands were worth, and were actually let by the Plaintiff to Under-Tenants, at 3 *l.* and 3 *l.* 10 *s.* an Acre *per Ann.* being *Hop* Lands, and the Tenants were by Covenants in their Leases to plant them and leave them planted with *Hops*, to lay on so

many Load of Dung every Year, to bear all Pariſh Taxes, and to be at other Expences, ſo that the Plaintiff had 167 *l. per Ann.* coming in by them, without any Expence on his Part, tho' he had never paid more than 40 *l. per Ann.* Rent, to *Thomas Goodhew.*

When the Defendant went down to *Canterbury*, he did take a View of the Lands in the Plaintiff's Company, who had promiſed and engaged him to lie at his Houſe; but it did not appear, that he had any Opportunity whatſoever of informing himſelf otherwiſe than from the Plaintiff himſelf, who was continually with him, what the Value of the Lands was, nor had the Defendant himſelf any Judgment, on a bare View of the Lands, what they were worth *per Ann.* but he aſked the Plaintiff to let him ſee the Counter-part of the Leaſes he had made to his Under-Tenants, which would have fully informed him therein, but that was ſhuffled off, on Pretence he could not find them, or that they were left with a Friend of his; and ſo the Defendant knew nothing of the Rent the Plaintiff received from his Under-Tenants, or the Terms on which they held the Lands; and it was fully proved in the Cauſe, that the Defendant expreſſed great Diſſatisfaction thereat, and was unwilling to come to any Articles or Agreement with the Plaintiff; but by the Importunity of the Plaintiff and others then preſent, he was prevailed on to agree to it; and thereupon the Articles in Queſtion were drawn up and executed between them, after which the Defendant diſcovered the Impoſition, and that the Plaintiff had above 100 *l. per Ann.* clear above the Rents he was to pay him, and that without any Trouble or Expence whatſoever on his Part: The Defendant on Diſcovery of this, and informing himſelf fully of the Value and Nature of the Land, he thereupon refuſed to execute a Leaſe purſuant to the Articles; and to oblige him to it was this Bill brought.

Lord *Chancellor* was clear of Opinion, that this Court was not bound to decree a Specifick Execution of Articles, where they appeared to be unreaſonable, or founded on a

Fraud, or where it would be unjuſt, or unconſionable to aſſiſt them; that from the Circumſtances of this Caſe theſe Articles were plainly of that Sort; that tho' there was no direct Fraud proved, yet from the great Undervalue of the Land, and that too without any Expence whatſoever on the Plaintiff's Part, it appeared to him to be an unreaſonable and ſhameful Contract; that it was indeed good at Law, and therefore left the Plaintiff to his legal Remedy for Recovery of what Damages he could by Non-Performance of the Articles, but diſmiſſed the Bill as to any Specifick Execution thereof.

Caſe 334. 23 *Novemb.* In Court Ld *Macclesfield.* *A.* Deviſes Lands to his Son in Tail, and 500 *l.* to *B.* to be paid on a Contingency; the Executor pays away the Aſſets in ſatisfying Bond Debts; the Contingency happens within two Years after the Teſtator's Death; yet *B.* cannot ſtand in the Place of the Bond Creditors, ſo as to charge the Deviſee of the Lands, nor compel the Executor to pay it out of his own Pocket.

Chitton verſus *Birt.*

ONE made his Will, and thereby deviſed his Lands to his Son, and the Heirs of his Body, and gave a Legacy of 500 *l.* to the Plaintiff, upon a Contingency which happened within two Years after the Death of the Teſtator: In the mean Time the Executor had paid away all the Aſſets in Satisfaction of Bond Debts; and the only Queſtion was, Whether the Plaintiff, the Pecuniary Legatee, ſhould be admitted to ſtand in the Place of the Bond Creditors.

And it was decreed he ſhould not; and that Decree now affirmed on a Rehearing, for that the Teſtator muſt be ſuppoſed to have as great a Kindneſs for the Deviſee of the Lands, as he had for the Legatee of the Money; and a Pecuniary Legatee ſhall never charge a Specifick Deviſee of Lands, even tho' the Lands were ſpecifically deviſed to the Heir at Law, according to the Diſtinction taken in the Caſe of *Herne* and *Merick*, 2 *Salk.* 416, which was cited as a Caſe in Point; but if the Lands had been left to deſcend to the Heir at Law, it would have been otherwiſe; but in the principal Caſe it would have been much harder ſtill to charge the Executor to pay this Legacy out of his own Pocket, becauſe the

Contingency might never have happened, or might have happened so many Years after, as would make it an exceeding great Hardship upon him, especially since he had duly administred the Assets in the mean Time, and the Accident happening after, ought not to be admitted to impeach what was done in Pursuance of his Duty before.

Hartop versus *Whitmore*.

Case 335.

A. devises to his Daughter 300 *l.* upon Condition she married with the Consent of her Mother, if not, 200 *l.* only; she marries in the Life Time of her Father and Mother, without their Consent; but afterwards the Father gives her 200 *l.* this is a Satisfaction of the Legacy.

A Man by his Will gave a Portion of 300 *l.* to his Daughter, if she married with her Mother's Consent; but if not, then 200 *l.* only; the Daughter after, in the Life Time of her Father and Mother, married without the Consent of either of them; but the Father was afterwards prevailed on to give a Portion of 200 *l.* and died, some Time after, without any Alteration of his Will, and the Daughter's Husband after becoming a Bankrupt, this Bill was brought by the Assignees under that Commission to have the 300 *l.* or at least the 200 *l.* given the Daughter for her Portion by the Father's Will.

But the Bill was dismissed, for that the 200 *l.* given by the Father in his Life Time, was a Satisfaction of the Legacy, and a Revocation of the Will, as to that Portion, and the 300 *l.* was to take Place on her marrying with her Mother's Consent, which could only be intended after the Father's Death, and consequently the Legacy never became due at all.

Emblyn versus *Freeman*.

Case 336.

A. directs that his Estate should be sold after his Death for several Purposes, and amongst others, that 200 *l.* should be disposed of as he by a *Note* should appoint, and dies Intestate, having given no Directions. This 200 *l.* shall be a resulting Trust for the Heir at Law.

Joshua Aylsworth, by Lease and Release, the 20th of *April* 1713, conveys several Lands to Trustees and their Heirs upon Trust, to sell the same after his Death; and out of the Money arising by such Sale, to pay off a Mort-

a Mortgage which was upon the ſame Eſtate, and other Debts by Specialty, and ſeveral other Sums of Money to the Plaintiffs, and ſeveral others of his Relations, and for Charities, and after Payment thereof, he directed that the Overplus of the Money ſhould be divided amongſt the Plaintiffs, and others, Share and Share alike, after a Sum of 200 *l.* which ſhould be liable to a *Note*, under the Hand of the ſaid *Joſhua Aylſworth*, payable to the Perſon or Perſons therein to be named and directed, the ſaid Truſtees to pay the ſaid 200 *l.* in ſuch Manner and Form as ſhould be appointed by the ſaid *Note*.

Joſhua Aylſworth after dies Inteſtate, without any Diſpoſition of the 200 *l.* and the only Queſtion now was, Whether the 200 *l.* ſhould be diſtributed according to the Statute of Diſtributions, in regard the Inteſtate had directed the whole Eſtate to be ſold and turned into Money; and when that was done, then this 200 *l.* was to be ſubject to his Appointment, and ſince he had made no Appointment, this 200 *l.* ought to be looked upon as Money, and ſo Part of his Eſtate, and to be diſtributed to the next of Kin.

But it was decreed by the Maſter of the *Rolls*, and affirmed by my Lord *Chancellor*, that it ſhould be a reſulting Truſt for the Heir at Law; that no one Rule whatſoever was more certain and invariable in this Court than that the Heir at Law ſhould have ſo much of the Lands as were not actually diſpoſed of; that this 200 *l.* not being diſpoſed of, did therefore belong to him, as ſo much of the Land itſelf would have done, if no Sale were made thereof; and that the Caſe of *Roper* cont' *Radcliff* had ſettled this Point, and that the Heir at Law was clearly intitled to this undiſpoſed Sum of 200 *l.* whereupon the Decree was affirmed.

Scudamore & al' versus *Scudamore*.

Case 337. In Court Ld *Macclesfield*.

One devises 8000 *l.* to be laid out in a Purchase, and settled on *A.* for Life, Remainder to *B.* and his Heirs; but if *B.* dies in the Life Time of *A.* then to *C.* and his Heirs, *B.* and *C.* both die in the Life Time of *A.* the Money not being laid out upon the Death of *A.* This Money shall be considered as Lands, and shall go to the Heirs of *C.* and not to his Executors.

THE Lady *Jane Scudamore*, by her Will in 1696, gave the Sum of 8000 *l.* to her Daughter Mrs. *Prince*, to be laid out by her in a Purchase of Lands, to be settled to the Use of herself for Life, with Remainder to *John Scudamore*, and his Heirs; and in Case he died in the Life Time of the said Mrs. *Prince*, to the Lord *Scudamore*, his Heirs, Executors, and Administrators. *John Scudamore* died in the Year 1714, and in the Life Time of Mrs. *Prince*. The Lord *Scudamore* likewise died in the Life Time of Mrs. *Prince*, in the Year 1716, having about three Months before his Death made his Will, and the Plaintiff his Lady Executrix; and having given several Legacies to the other Plaintiffs, and leaving the Defendant *Frances Scudamore* his only Daughter and Heir at Law, an Infant; and in the Year 1717, Mrs. *Prince* died, and the Money had never been laid out; and now this Bill was brought by the Plaintiff against the Lady *Frances*, Heir at Law, and against the Executors of Mrs. *Prince*, to have the Money, for the Benefit of the Executors and Legatees of the Lord *Scudamore*; and that no Purchase might be made for the Benefit of the Defendant, the Heir at Law of Lord *Scudamore*.

Lord *Chancellor* was clear of Opinion, and decreed accordingly, that the Money belonged to the Defendant the Heir at Law, as the Lands would have done if a Purchase had actually been made, as it ought to have been, by Mrs. *Prince* the Trustee; and that to decree it otherwise, would be to put it into her Power and Election which of the two should have it; for if the Purchase had been made, it must have gone to the Heir; but if she by delaying the Purchase may alter the Right, and give it to the Executors, this would be to make it her Will, and not the Will of the first Testator, which would be very unreasonable and inconvenient; and therefore, tho' the Trust for laying out the Money was personally con-

fined to Mrs. *Prince* without nominating Executors; yet they were imply'd and included in it; and this Case was the stronger, because the Heir at Law of Lord *Scudamore* was an Infant, and as Mr. *Prince* survived my Lord two Years, the Infant Heir might have brought her Bill against Mrs. *Prince* herself, the Trustee, to have had the Purchase made, and her Latches in not doing it, is not to turn to her Prejudice, being an Infant; the Cases cited were *Lingen* and *Souray* in Lord *Harcourt*'s Time, and a Case lately decreed of *Jones* cont' *Powell*.

An Infant not to suffer by his Laches in not bringing a Bill in Time.

Note, In this Case it was agreed by my Lord *Chancellor* to be a declared Rule in this Court; that if Money be devised to be laid out in the Purchase of Lands to be settled on one, and his Heirs, that the Person himself, for whose Benefit the Purchase was to be made, may come into this Court, and pray to have the Money itself, and that no Purchase may be made, because none have an Interest in it but himself; but if he dies before the Purchase made, or Payment of the Money, so that the Question comes between his Heirs and Executors, which of them shall have the Money, the Heir shall be preferred, and it shall for his Benefit be considered in a Court of Equity, as if the Purchase had been actually made in the Life of his Ancestor, for two Reasons. 1*st*, Because the Heir is to be favoured in all Cases, rather than the Executors, who by the old Law were to have nothing to their own Use. 2*dly*, If the Executor should have, it would be against the Words of the Will, which gave it to the Heirs.

Case 338.
Vid. Post. S.C.

Kemp and *Kelsey*.

Whether a Release given by one who Marries the Daughter of a Freeman of *London* shall Bar the Husband and Wife of their Customary Share.

THE Plaintiff's Wife was a Daughter of a Freeman of *London*, and after her Marriage with the Plaintiff, her Father gave her 100 *l.* and her Husband at the same Time executed a Release for the said 100 *l.* in full of all his Wife's Customary Part, or Share, which was or might be due to his Wife by the Custom of *London*, or otherwise by her Father; her Father afterwards made his Will, and thereby devised to his Daughter the Plaintiff's

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tiff's Wife 400 *l.* and made the Defendant his own Wife Executrix, and died, having one other Daughter possessed of a Personal Estate, to the Amount of 10,000 *l.*

And this Bill was brought for a Discovery of the Personal Estate; that upon the Plaintiff's bringing the 100 *l.* into *Hotchpot*, they might be let into a Customary Part of the Father's Estate, and suggested some Fraud in obtaining the Release. To this Bill the Defendant pleaded the Release in Barr.

And it was argued for the Plaintiff, that the very End of the Bill being to be relieved against the Release, it was very extraordinary to plead the same Release in Bar, especially as it was alledged to be obtained by Fraud and undue Means, that this Release could not be any Bar in this Case, being given by the Husband after Marriage; that in the Case of *Blundell* and *Barker*, it was a Question, Whether a Child could release a Customary Share, being only a future Right before it became due; and yet that Release was by the Child itself, and before Marriage, but here the Release is by the Husband, and that too after Marriage, which could not Bar any future Right which could be coming to his Wife.

On the other Side it was argued, that the Release was a good Bar, or at least, that the direct Question was, Whether by the Custom of the City such a Release was a good Bar or not; and therefore, 'till the Custom be certify'd to the contrary, the Release is *Prima Faciæ*, a good Bar; that the Wife herself in this Case could give no Release, being under Coverture; that the Husband is intitled to every Thing which belongs to the Wife, and may release any Right or Thing in Action belonging to her, as he may give away or dispose of her Fortune as he thinks fit, if not precluded by his own Agreement, the whole Power thereof being by Law lodged in him; that the Suggestion of Fraud in obtaining this Release, could not take away the Force of it, or deprive them of the Benefit of pleading of it, for there it would be but to suggest Fraud in obtaining an Award, passing an Account,

count, or procuring a Releaſe, and the Party would be wholly deprived of the Benefit thereof; but the contrary of this is every Day's Experience.

Lord *Chancellor* ſaid, the Queſtion in *Barker*'s and *Blundell*'s Caſe was not, whether the Child could releaſe her Cuſtomary Share, for that he thought clearly ſhe could not, being a meer future Right; but whether ſuch Releaſe would amount to a Compoſition or Agreement in Bar of her future Right, or as they call, be a compounding for her Cuſtomary Share; but in this Caſe the Huſband had no Power whatſoever to releaſe a future Right of his Wife's; that ſhe might ſurvive him, and would then be intitled to it in her own Right; beſides, this Releaſe is ſuggeſted to be fraudulently obtained; and therefore, ordered the Plea to ſtand for an Anſwer, with Liberty to except, ſo as to have an Account of the Freeman's Perſonal Eſtate, and the Benefit of the Releaſe to be ſaved to the Hearing, when the Queſtion would come more properly, whether ſuch Releaſe by the Cuſtom of the City were good or not.

Caſe 339.

Nicholas and *Nicholas*.

In Caſes in which Chancery and the Spiritual Courts have a concurrent Juriſdiction, Chancery won't hinder the Spiritual Courts, being firſt poſſeſſed of the Caſe, from proceeding in it.

THE Plaintiff's Teſtator by Will among other Things gave two Children 500 *l.* apiece, and one of them being 14, and the other 16 Years of Age, apply'd by their own Father to the Court of Arches, and had him appointed their Guardian, who thereupon cited the Plaintiff, the Executor, into the Spiritual Court, and exhibited a Bill againſt him for ſubſtracting of Legacies given to his two Daughters; whereupon the Plaintiff, the Executor, brought this Bill in this Court, praying, that an Account may be taken here, and that in Regard the Legatees were Infants, and could not give any legal Diſcharge for the Legacies, that he might bring it into Court to be put out for their Benefit; and by this Bill offered to bring the Money into Court, and pray'd an Injunction to ſtay the Proceedings in the Spiritual Court; and on

2 Motion,

Motion, had an Injunction, 'till an Anſwer, and further Order.

To this Bill the Defendants, the Infants, by their Father and Guardian pleaded the whole Proceedings in this Court, and the Pendency of that Suit before the Bill brought.

And it was argued by Dr. *Strahan* and Dr. *Sayer*, two Civilians, in ſupport of the Juriſdiction, that the Spiritual Court has always been allowed to have a concurrent Juriſdiction with this Court in Caſes of Legacies ariſing meerly out of a Perſonal Eſtate, as theſe were; that in all Caſes of concurrent Juriſdictions, which Court ſoever was poſſeſſed of the Cauſe had a Right to proceed, and could not be reſtrained or prohibited by the other Court; that this was called in Law a Prevention of Juriſdiction; that it was not only ſo by the Civil Law, but alſo in all other Courts, which had a Concurrency of Juriſdiction, as between the *Exchequer* and the *Chancery*, the Counties Palatine and the Chancery, *&c.* that the Father in this Caſe was a proper Guardian; and that he muſt give Security before he can have the Childrens Legacies, by the Courſe of the Courts; that on Application, if either he or any of his two Sureties died, or became ſuſpected as to his Circumſtances, that the Court would oblige them to give better Securities; that they could not indeed ſay, that by the Courſe of that Court, the Guardian would be obliged to pay Intereſt for the Legacies, which was urged on the other Side, was an Argument in Favour of *Chancery*, that they would Order the Money to be put out at Intereſt for the Benefit of the Children; but the Civilians inſiſted, that they being firſt poſſeſſed of the Cauſe, this Court would not injoin them from proceeding to recover the Childrens Legacies.

The Spiritual Courts cannot oblige a Guardian to pay Intereſt for the Infants Money in his Hands, tho' they will compel him to give Security, but Chancery will do both.

Lord *Chancellor* agreed, that in Caſe of a Concurrent Juriſdiction, their Arguments were juſt, and that this Court had a Juriſdiction to ſee, that the Executor, who was but a Truſtee, performed his Truſt, and that was the Juriſdiction this Court exerciſed in ſuch Caſes; that

if the Plaintiff were in earnest, he ought not only to have offered to bring the Money into Court, but he ought actually to have brought it, and that had at once put an End to the Proceedings in the Spiritual Court; yet his not doing of it, plainly proved, that his Bill was only for Delay, and keeping the Money in his Hands; and therefore ordered the Injunction to be dissolved, unless the Plaintiff within ten Days brought the 1000 *l.* and Interest, from a Year after the Testator's Death into this Court, otherwise they were at Liberty to proceed against him in the Spiritual Court; since, if this Practice would prevail, he might keep the Injunction on Foot as long as he pleased, and, whenever he had a Mind to it, dismiss his own Bill.

Chancery will grant an Injunction to stay the Husband's Proceedings in the Spiritual Courts, for a Legacy given to his Wife, because that Court cannot oblige him to make an Adequate Provision on her.

Mr. *Mead* cited a Case where this Court, the last Seal, granted an Injunction to stay the Husband's Proceedings in the Spiritual Court, for a Legacy given to his Wife, because the Court could not oblige the Husband to make an adequate Provision or Settlement on his Wife, as this Court would do, before they would permit him to receive the Legacy; and said, the Cause was stronger in respect of the Security for the Benefit of the Infants, which carried Interest; and that the least Security this Court required, was a Recognisance with two Sureties, which affected the Land.

Case 340.

Opie and *Godolphin*.

At the *Rolls*. One who lends Money on a Security, which he is advised by a Lawyer to be a good one, yet if it proves otherwise, and he has Notice that another made Title to it, he must deliver up all the Writings relating to it, but not the Mortgage Deed, for there may be Covenants in that for Payment of the Money.

A Mortgagee for 500 Years brought a Bill to foreclose, but on Proof that he had Notice of the Plaintiff's Title, which was as Contingent Devisee of a Term for Years, on the Legatees dying, without leaving Issue behind him, his Bill was dismissed; and now the Plaintiff brought this Bill for Discovery of Writings, and to have the Mortgage Deed delivered up.

The Defendant insisted it was hard enough to lose his Money, that the Plaintiff ought not to force the Writing from him too, especially the Mortgage Deed, wherein was a Covenant for Payment of the Mortgage Money, and wherein possibly they might Recover in Damages, that they had the Opinion of a great Man (Serjeant *Hooper*) that this Devise over to the Plaintiff was void.

But the Court was clear of Opinion, that the Devise over was good, the dying without Issue being confined to a Life then in Being, and decreed that the Writings should be delivered up to the Plaintiff, for that the Writings followed the Estate; but the Court would not oblige the Defendant to deliver up the Mortgage Deed for the Reasons before urged.

Ex parte *Jephson* Serjeant at Arms.

Case 341.

The Nature of the *Serjeant at Arms*'s Office, that he must return a *non est inventus* before a Sequestration can go.

THIS was a Petition by the *Serjeant at Arms*, that in Regard he was an ancient Officer of the Court, and by the ancient Use of the Court no Process of Sequestration could Issue, but on a Return of *non est inventus* by the *Serjeant at Arms*; yet by the late Practice, which as it was not introduced above 10 or 15 Years ago, committing the Parties to the Warden of the *Fleet*, and awarding a Sequestration on his Return of *non est inventus*, that might be altered, and the ancient Course restored; for that otherwise the *Serjeant at Arms* by this late Method of Practice was deprived of his Fees; and a Case was cited in 1685, in the Time of Lord *Jefferies*, where a Man that was committed to the *Fleet* for not performing a Decree, and after made his Escape, and got into *Holland*, as appeared by Affidavit; yet the Court would not grant a Sequestration upon Return of *non est inventus* by the Warden of the *Fleet*, but awarded a Process to the *Serjeant at Arms*, to take him upon the Return of *non est inventus*, then a Sequestration to go.

And

And it was urged, the late Practice to the contrary was an Innovation, and ought to be altered; so where the Defendant had Time given him to put in his Answer upon entring his Appearance with the Register, which was a Practice introduced about 20 Years ago, and was for the Expedition of the Suitor in shortning the Process, the Course was on the Expiration of the Time, to move, that he might Answer in four Days, or stand committed, upon which Method of Proceeding, as it was alledged, no Sequestration could Issue 'till a return of a *non est inventus* by the *Serjeant at Arms*, and not such a Return by the Warden of the *Fleet.*

That this Commitment to the *Serjeant at Arms* was no greater Expence to the Suitor, than when the Commitment was immediately to the *Fleet*; that if he obey'd the Order, whilst in Custody of the *Serjeant at Arms*, there was no farther Proceedings against him; if he did not, the *Serjeant at Arms* was the Officer of this Court, that was to send him to the *Fleet.*

That this was his proper Office to search and find out the Contemners of this Court; and the Warden of the *Fleet*, whose Office it was to attend at the *Fleet*, and take Care of Prisoners sent thither, was not to be supposed to be absent from thence, or to take them immediately into Custody, but as they were brought to him by the proper Officer.

That it was true, in Case of Contemptuous Words, or for a Contempt in assaulting or striking any who shall serve the Process of this Court, the Commitment was immediately to the *Fleet*; but the Reason of this was, because the Commitment in that Case was in Nature of a final Execution; that no Process of Sequestration was to go upon it, but he was to answer the Interrogatories and clear his Contempt, and pay the Costs, which was the Punishment he was to undergo, and the only one in that Case, and so for not bringing of Writings into Court; but that wherever a Sequestration was to go, there must be first an Order for Commitment to the *Serjeant*

at Arms, and upon his Return of *non eſt inventus*, then the Sequeſtration to Iſſue, and conſequently the Commitment immediately to the *Fleet*, after which the Order for entring his Appearance with the Regiſter, was not only unneceſſary, but a Burthen to the Suitor.

My Lord *Chancellor* ordered the Regiſter to look into Precedents, and to certify to him how the Practice had gone; but ſaid, that if the *Serjeant at Arms* was intitled by the ancient Courſe to a Fee by the Caption in theſe Caſes, that it could not be altered without an Act of Parliament; that tho' he approved very well of ſhortening the Proceſs of the Court, yet the Queſtion was concerning the diverting of the Proceſs of the Court, Whether it ſhould go to the *Serjeant at Arms*, or to the Warden of the *Fleet*, for the Proceſs was not at all ſhortned by it, but a Wrong done to the *Serjeant at Arms*.

That in Caſe of entring an Appearance with the Regiſter, no Wrong was done to any one more than another; that the Courſe was formerly to grant an Attachment, then a Proclamation, then a Commiſſion of Rebellion, then a *Serjeant at Arms*; but that by the late Practice of entring his Appearance with the Regiſter, before any of thoſe Proceſſes awarded, or at any Time after, and before the laſt Proceſs for a Commitment, every Thing was admitted to be right, and he was ſuppoſed to be in Court, ſo as to ſtand committed, if he did not anſwer in four Days after the Time expired; and the Warden of the *Fleet* being in Court, inſiſted, that the entring his Appearance with the Regiſter, prevented the Neceſſity of any previous Order for his Commitment, even to the *Serjeant at Arms*, but this was not clearly agreed; but as to the other Proceſs precedent to the Commitment to a *Serjeant at Arms*, it was clearly agreed to be cut off by his entring his Appearance, and this my Lord ſaid was no Injury to any one, becauſe none of the preceeding Proceſs iſſued at all, and conſequently could not Iſſue to a wrong Perſon, and ſaid, it would be the ſame too, even in the Caſe of the *Serjeant at Arms*,

if the Courſe of the Court ſhould be certified to be, that no Proceſs to him was neceſſary; but that the Commitment might be immediately to the *Fleet* on his not anſwering within the Time, after entring his Appearance with the Regiſter; but whether that was the Courſe or not, was the principal Queſtion, and concerning which, my Lord would be attended with Precedents.

It was ſaid, in this Caſe, that the Practice of granting Sequeſtrations was very ancient, and the Warden of the *Fleet* ſaid, he had a Table of Fees as ancient as 3 *Eliz.* which were the Fees for each Days proceeding in the Sequeſtration; but it was agreed by the Court, that at firſt the Sequeſtration was only to ſequeſter the Thing in Demand, but that for ſome Ages paſt, it has been extended alſo to the Goods and Chattels of the Party.

It was likewiſe ſaid, that by a *Cepi* returned by the Sheriff of the County, the Party was to be brought up and committed to the *Fleet*, by Order of the Court, if he did not appear and anſwer, the Bill was to be taken *pro Confeſſo*, and to bring him on a *Cepi* returned, the Sheriff was to be amerced, or an Order to be made for a Meſſenger to go to him.

Afterwards, *Saturday* 13th of *May* 7 *Geo.* the following Order was made.

ORDO CURIÆ.

Ex parte Servient ad Arma.

" WHereas the *Serjeant at Arms* attending the Right
" Honourable the Lord High Chancellor of
" *Great Britain*, on the 18th Day of *February* laſt, pre-
" ferred his humble Petition to his Lordſhip, ſetting forth,
" that by the ancient Rules and Practice of this Court,
" the *Serjeant at Arms*, is intitled to take all Perſons
" into Cuſtody, who ſtand in Contempt to a Commiſ-
" ſion of Rebellion, returned *non eſt inventus*; but that

" the Court hath of late for Contemners not appearing
" to be examined on Accounts before the Masters of
" this Court, not producing Writings and other Con-
" tempts, granted Orders of Commitment, without
" issuing forth the usual Process against them; and that
" the Court of late frequently gave Defendants further
" Time to Answer, on entring their Appearances with the
" Register; and that thereupon for not answering at
" the Time limited, Commitments have been granted,
" and the said several Orders of Commitment have been
" executed by the Warden of the *Fleet*, or else he has
" made Return *non est inventus*; hereupon Sequestrations
" have been obtained contrary to the said ancient Rules
" and Practices; by which Means the Process of this
" Court is now rarely carried on by a *Serjeant at Arms*,
" and he is thereby deprived of great Part of his Fees
" and Profits belonging to his Office; and the said Pe-
" tition coming to be heard before his Lordship, on the
" 18th Day of *March* last, in Presence of Mr. *Sollicitor*
" *General*, Mr. *Lutwich*, and *Mead*, of Council fo the
" *Serjeant at Arms*, and Mr. *Cowper* and Mr. *Williams* of
" Council for the Warden of the *Fleet*, upon hearing of
" the said Petition read, and what was alledged on
" either Side, his *Lordship* order'd, that Precedents re-
" lating to the Matters aforesaid, should be laid before
" him; and Council again this Day attending him upon
" hearing several Precedents read; and what was further
" alledged on either Side, declared, that no Sequestration
" can regularly Issue to sequester the Estate of any Per-
" son who cannot be found; but upon the Return *non*
" *est inventus* of the *Serjeant at Arms*, and doth there-
" fore Order, that from thenceforth, where any Person
" is in Contempt, either for want of an Appearance or
" Answer, or for not yielding Obedience to any Order of
" this Court (unless it be for contemptuous Language, or
" the beating and abusing any Person in the serving the
" Process of this Court, or other Contempts of the
" like Nature) the *Serjeant at Arms* attending this Court,
" do

" do apprehend and bring the Contemner to the Bar of
" this Court, to anſwer ſuch Contempt; but if the
" Contemner cannot be found, then to return *non eſt*
" *inventus*, to the End a Sequeſtration may regularly
" iſſue according to the ancient Rules and Practice of
" this Court, and that Proceſs do for the future iſſue
" accordingly; and that it may be made a Part of all
" Orders for giving Time to anſwer, or for doing any
" other Act upon the Party's entring his Appearance
" with the Regiſter; that the Party when he enters ſuch
" Appearance, do likewiſe conſent, that a *Serjeant at*
" *Arms* do go againſt him, as upon a Commiſſion of
" Rebellion, returned *non eſt inventus*, in Caſe of Non-
" Compliance; and that this Order be hung up in the
" Regiſters and Six Clerks Offices of this Court, that all
" Perſons may take Notice thereof, and yield Obedience
" to the ſame."

Edward Goldsborough, Dep. Regiſter.

DE
Termino S. Hillarii,
1720.
In Curia Cancellariæ.

Earl of *Strafford* verſus Lady *Wentworth*.

Caſe 342. 8 *February*. In Court Ld *Macclesfield*. Tenant for Life makes a Leaſe for Years, reſerving Rent at *Lady-Day* and *Michaelmas*, and dies on *Michaelmas-Day* about 12 a-Clock at Noon, the Rent ſhall go to his Executor, and not to the Remainder-Man; but if ſuch Tenant had a Power of Leaſing, and had died in Manner aforeſaid, the Rent in reſpect to the Continuance of the Leaſe, muſt have gone to the Remainder-Man, as incident to the Reverſion.

SIR *Henry Johnſon* was Tenant for Life, with Remainder to the Lady *Wentworth*; Sir *Henry* made Leaſes for Years, reſerving the Rent at *Lady-Day* and *Michaelmas*, by half Yearly Payments, and died on *Michelmas-Day*, about 12 a-Clock at Noon, and the Queſtion was, Whether theſe Rents belong to the Plaintiff his Repreſentative, who had taken out Adminiſtration to him, or whether they ſhould go along with the Land to Lady *Wentworth*, in Remainder, or whether the Tenants ſhould have the Benefit of retaining them in their own Hands, as belonging neither to the Plaintiff or Defendant.

The Caſe was opened and debated by the *Attorney* and *Sollicitor-General* for the Plaintiff, but before any others had ſpoke to it, it was ſent to a Maſter to State the ſeveral Facts, as to the Leaſes, that is to ſay, what Leaſes had been made by Sir *Henry*, as to the Part of the Eſtate whereof he was ſeiſed in Right of his Lady, what Leaſes, as to that Part whereof he was Tenant for Life, and

what Power was reserved by his Marriage Settlement, to make Leases; and what Leases were made by Parol, and what in Writing; and whether in Pursuance of his Power, or whether by Virtue of his Interest.

But my Lord *Chancellor* declared, that if Tenant for Life makes a Lease for Years, reserving Rent at *Lady-Day* and *Michaelmas*, during the Term, and dies in *Michaelmas* or *Lady-Day*, at 12 a-Clock, or any other Time before the last Instant; that the Rent in such Cases is nevertheless due to his Representative; for tho' the Lessee had Election to pay it any Time before the last Instant of those Days, if this Lease had so long continued; yet it being payable on those Days, during the Term, and the Lessor being living some Part of those Days, his Election to defer it to the last Instant was taken away by such dying, before the Rent became compleatly due, and consequently it would belong to the Representatives of the Lessor; and this he said was so clear, that he would no more send it to be determined at Law, than he would, whether the Father's Estate should descend to the eldest Son; for the Term having a Continuance some Part of those Days, the Lessee at his Peril ought to pay his Rent before the Expiration of the Term, it being payable on those Days during the Term, and the Term did subsist on those Days, tho' not to the last Instant.

And this was the Case of the Lady *Cole*, in the *Northern* Circuit in the late King *William*'s Reign, wherein Mr. Justice *Tracy* took the Advice of the Judges, and gave his Opinion accordingly; that where the Lessor Tenant for Life on such a Reservation, died about six a Clock in the Evening, that the Rent was become compleatly due, and belonged to his Executor, else he himself could not give a proper Discharge for it, 'till the last Instant, which most certainly he may at any Time of the Day, whereon it is payable, and this does not at all contradict *Baskervill*'s cont' *Mayo*, in *Sand.* 283.

But if ſuch Leaſe were made, by Virtue of a Power to make Leaſes in a Settlement, as the Term ſubſiſted, and had Continuance there by the Death of the Leſſor before the laſt Inſtant, the Rent would go along with the Land to him in Remainder, or Reverſion; becauſe being payable on thoſe Days during the Term, the Leſſee had 'till the laſt Inſtant of thoſe Days to pay his Rent, the Term enduring 'till the laſt Inſtant of thoſe Days, and conſequently the Leſſor dying before it was compleatly due, his Repreſentatives can make no Title to it, and ſo he ſaid, if ſuch Leaſe were only an equitable Leaſe, that is, ſuch a Leaſe as ought to be made good in a Court of Equity, tho' it were in ſome Circumſtances defective in the Execution of it, and not ſtrictly purſuant to the Power; and in thoſe Particulars, my Lord *Chancellor* was clear, and ſaid, there could be no Manner of Doubt of them.

Afterwards this Cauſe came back upon the Maſter's Report, to whom it was referred to ſettle the Nature of the ſeveral Leaſes made by Sir *Henry Johnſon*; and upon his Report, it appeared, that ſome of them were made by him generally, and thoſe determined on his Death, others were made by Virtue of a Power for making Leaſes, and thoſe ſtill continued; and my Lord was clear of Opinion, that as to Leaſes of the firſt Sort, the Rents belonged to his Executors, becauſe, tho' for the Benefit of the Tenants they had 'till the laſt Inſtant of *Michaelmas-Day* to pay the Rents; yet the Reſervation being at *Michaelmas-Day* and *Lady-Day*, conſequently ſo ſoon as either of thoſe Days began, they were at their Peril to take Care that they were paid accordingly, becauſe they were then actually become due to Sir *Henry Johnſon*, who made the Leaſes, and his Right to the Rent became actually veſted in him.

But as to the Leaſes made, by Virtue of the Power, they ſtill had Exiſtence and Continuance after the Death of the Leſſor, in the ſame Manner as they had during his Life; and therefore the Tenants had 'till the laſt Inſtant

of

of those Days to pay the Rents, and then, when the Lessor died before, the Rent goes along with the Reversion to those who are intitled to it.

Case 343.

Lady *Shaftsbury*'s Case.

A. is appointed Receiver of an Estate, out of which he is to pay *B.* an Annuity quarterly, *A.* acquaints *B.* who his Banker was, and that the Money should be deposited in his Hands for his Use. *B.* names another, being a Person he used to deal with, and Orders him to pay it into his Hands, which *A.* did several Times; but the Money payable on *Michaelmas*, being paid in, on *July* before, on *Michaelmas-Day* the Banker stopt Payment, and became a Bankrupt, it was held, that the Loss should fall wholly on the Receiver, *B.* having no Right to the Money before that Day.

THE Lady *Shaftsbury* being intitled to 800 *l. per Ann.* Jointure; and on the Decree and Master's Report, 600 *l. per Ann.* being allowed for the young Earl of *Shaftsbury*'s Maintenance and Education, one Mr. *Wych* was appointed Receiver of the Rent of the Estate, and to make Payment of both these Annuities to the Lady *Shaftsbury*. Mr. *Nichols* in *Fleetstreet* was Mr. *Wych*'s Goldsmith, where he kept his own Cash; Mr. *Wych* waited on the Lady to know where she would be pleased to have the Money as it was received, and mentioned to her both Sir *Robert Child* and Mr. *Nichols*; but the Lady said, Mr. *Norcort* was the Banker, at whose Shop their Family had lodged their Cash, and therefore ordered what Moneys were to be paid to her, should be paid in at Mr. *Norcort*'s Shop; Mr. *Wych*, that there might be no Delay, generally sent up the Money before Quarter-Day, and placed it in Mr. *Norcort*'s Hands, where the Lady *Shaftsbury*, as soon as Quarter-Day was over, received it, both for herself and her Son; and about *July* last he lodged 350 *l.* being one Quarter of the Lady's and her Son's Annuities, in the said Mr. *Norcort*'s Hands, in Order to be ready at *Michaelmas* Quarter, as appeared by his own Affidavit; on *Michaelmas-Day* Mr. *Norcort* stops Payment, and is since become a Bankrupt, and now on the Lady *Shaftsbury*'s Petition, the Question was, on whom the Loss should fall.

My Lord *Chancellor* was clear of Opinion, that the Lady *Shaftsbury* ought not to bear the Loss of any Part of it, for 'till *Michaelmas-Day* was passed, she had no Right to demand or receive it; that therefore, in the mean Time, Mr. *Norcort* was Mr. *Wych*'s Cashire, and he

 might,

might, notwithſtanding his having lodged the Money there, have taken it out again before *Michaelmas-Day* was paſt, even tho' it were on *Michaelmas-Day* itſelf, provided he had it ready the next Day to pay the Lady; that conſequently *Norcort* could have no Power to receive it for the Lady before, becauſe ſhe had no Power herſelf, nor any Right to demand it before Quarter-Day; that ſhe could not demand, or at leaſt receive it on *Michaelmas-Day* itſelf, becauſe it is one of the Days that no Goldſmiths open Shops, or make any Payments whatſoever; and therefore the lodging the Money at that Shop before the Lady became intitled to it, ought not to turn to her Prejudice, but ſhe muſt have it made good to her by the Receiver; but whether it ſhould fall on the Receiver Mr. *Wych* himſelf, or to be born out of the Lord *Shaftsbury*'s Eſtate, my Lord ſaid, would come properly in Queſtion, when he made up his Accounts with my Lord on his coming of Age, and was not now in Queſtion before the Court; but ſaid, he was inclined to think the Receiver was not to be anſwerable for the Loſs, any more than if he had been bringing it up in *Specie*, and had been robbed on the Road.

Another Part of the Petition was to have the Sum of 143 *l.* extraordinary, for the Expences my Lady had been at in a Fit of Sickneſs of the young Earl, over and above his Quarterly Maintenance, and this was not at all oppoſed, but for Form Sake, was ſent to the Maſter to ſtate the Matter, and to Report, whether that Sum had been actually expended on that Occaſion, or not.

DE
Termino Paſchæ,
1721.
In Curia Cancellariæ.

Caſe 344. **Seagood verſus Meale and Leonard.**

A. agrees with *B.* for the Purchaſe of 5 Houſes, which were in Mortgage to *J. S.* and pays him a *Guinea* in Earneſt. *B.* writes a Note to *J. S.* and deſires him to deliver up the Writings, he having diſpoſed of them, which *J. S.* refuſed, unleſs all the Mortgage Money was paid him down, and afterwards Purchaſes them himſelf; on a Bill brought by *A.* for a Specifick Execution of the Agreement, it was held, that neither the *Guinea* paid down, nor the Note, which was only an Evidence of Aſſent, but did not aſcertain the Terms of the Agreement, were ſufficient to take it out of the Statute of *Frauds* and *Perjuries.*

THE Bill was brought for a Specifick Execution of an Agreement for the Purchaſe of nine Houſes, which were in Mortgage to the Defendant *Leonard* for 150 *l.* the Defendant *Meale*, the Owner of the Houſes, agreed to ſell them to the Plaintiff for ſuch a Sum of Money, and the Plaintiff paid him a Guinea in Part, and ſent a Note to this Effect, Mr. *Leonard, pray deliver my Writings to the Bearer, I having agreed to diſpoſe of them, am your humble Servant.* The Defendant *Leonard* would not part with them, unleſs all his Money were paid him down; and after bought the Houſes of *Meale* himſelf, and thereupon the Plaintiff brought this Bill.

The Defendant by his Anſwer inſiſted upon the Statute of *Frauds* and *Perjuries*, and the Queſtion was, Whether the Letter or Note would bring it out of the Statute; for as to the Payment of the *Guinea*, that was

agreed clearly of no Conſequence, in Caſe of an Agreement touching Lands or Houſes, the Payment of Money being only binding, in Caſes of Contracts for Goods.

And it was decreed that would not, for it ought to be ſuch an Agreement as ſpecify'd the Terms thereof, which this did not, tho' it was ſigned by the Party; for this mentioned not the Sum that was to be paid, nor the Number of Houſes that were to be diſpoſed of, whether all, or ſome, or how many, nor to whom they were to be diſpoſed of, neither did this Letter mention, whether they were to be diſpoſed of by way of Sale or Aſſignment of Leaſe, and ſo all the Danger of Perjury, which the Statute was to provide againſt, would be let in to aſcertain this Agreement.

This Caſe differs from a Caſe, which was cited of a Letter wrote by one, promiſing to give ſuch a Fortune with his Daughter to one who ſhould marry her. A Man who marries on the Encouragement of this Letter, ſhall recover, becauſe the Agreement is executed on his Part as far as it can be, and can never be undone after.

Promiſing by Letter to give ſo much, as a Portion, ſufficient to bring the Agreement out of the Statute of *Frauds*.

So where a Man on Promiſe of a Leaſe to be made to him, lays out Money on Improvements, he ſhall oblige the Leſſor afterwards to execute the Leaſe, becauſe it was executed on the Part of the Leſſee; beſides, that the Leſſor ſhall not take Advantage of his own Fraud to run away with the Improvements made by another; but if no ſuch Expence had been on the Leſſee's Part, a bare Promiſe of the Leaſe, tho' accompany'd with Poſſeſſion, as where a Leſſee by Parol agreed to take a Leaſe for a Term for Years certain, and continued in Poſſeſſion on the Credit thereof; yet there being no Writing to make out this Agreement, it is directly within the Statute, and ſo was held by the Maſter of the *Rolls*, in the Caſe of *Smith* and *Turner*, *Mich.* laſt at the *Rolls*, and in the principal Caſe the Bill was diſmiſſed, but without Coſts for ſome Fraud in the Defendants to defeat the Plaintiff of his Bargain.

Tho' a Leſſee for Years on a Parol Agreement, and the Credit of a Promiſe of having a Leaſe made to him, continues in Poſſeſſion; yet it is within the Statute of *Frauds*, and Equity won't inforce, eſpecially if no Improvements were made by him.

Semphill

Caſe 345. In the Dutchy Court, *coram Lechmere* Chancellor, *King* Chief Juſtice, and Juſtice *Dormer*. *A.* having Iſſue three Daughters, *B. C.* and *D.* deviſes 1000 *l.* to *B.* to be paid her at the Age of 21, or Marriage, upon Condition that ſhe married with the Conſent of his Executors; and likewiſe deviſes to her ſeveral Meſſuages, &c. and after ſeveral other Legacies, he deviſes the Reſidue of his Eſtate to the Executors, for the Benefit of his Children, tho' *B.* married a Perſon, who made his Addreſſes to her in her Father's Life Time, which the Father knew, and was diſſatisfy'd at, and had Notice by the Executors of her Father's Will, yet there being no Limitation over, this won't amount to a Forfeiture, being only *in Terrorem*.

Semphill & Ux' verſus *Bayly* & Ux'.

Nathaniel Gaskill had Iſſue three Daughters only, *viz. Sarah* his eldeſt, one of the Plaintiffs, *Elizabeth* his ſecond, and *Rebecca* his third, both Defendants, and there being an Amour carried on between the Plaintiffs in his Life Time, he greatly diſliked thereof, and declared, if his Daughter married the Plaintiff, he would not give her a Groat, upon which he diſcontinued his Suit to her; after, the Father the 12th of *November* 1716, makes his Will, and thereby deviſes all his Real and Perſonal Eſtate to his Executors, to the Uſes following,

That is to ſay, to his Daughter *Sarah* for her Maintenance 35 *l. per Ann.* and no more, and to his Daughter *Elizabeth* 35 *l. per Ann.* for her Maintenance, and no more, and then goes on; and if my Daughter *Sarah* ſhould happen to marry with the Conſent of my Executors, then I deviſe to her the Sum of 1000 *l.* in Part of her Portion to be paid to her, at the Age of 21 Years, or Day of Marriage, which ſhall firſt happen, and at the End of three Years, after my Death, all the Meſſuages, and enumerates ſeveral Meſſuages, &c. all which I will, and ſhall be to my ſaid Daughter for Life, without Impeachment of Waſte, Remainder to her firſt and other Sons ſucceſſively in Tail general, Remainder to her Daughters in Tail general, to take as Tenants in Common, and not as Joint-tenants, paying to his Wife 70 *l. per Ann.* during her Life.

Item, I give to my Daughter *Elizabeth* 1000 *l.* in part of her Portion, to be paid to her at her Age of 21 Years, or Day of Marriage, which ſhould firſt happen, and at the End of three Years after my Death, all that Meſſuage, &c. and ſo gives her ſeveral other Meſſuages

and

and Lands, other Parts of his Eſtate, all which he gives her for Life, without Impeachment of Waſte, with the like Limitations as is made in the former Siſter's Caſe, and then Orders them to take as Tenants in Common.

Item, I give to my Daughter *Rebecca* 30 *l* *per Ann.* for her Maintenance, 'till ſhe attain the Age of 15 Years, and after 35 *l. per Ann.* *Item*, I give my Daughter *Rebecca* 1000 *l.* in Part of her Portion, to be paid to her, at her Age of 21 Years, or Day of Marriage, which ſhall firſt happen; and if ſhe ſhall marry with the Advice and Conſent of my Executors, then I give her all the Meſſuages, *&c* and ſo gives her other Parts of his Eſtate, all which he directs ſhall be ſettled on her in like Manner for her Life, without Impeachment of Waſte, and ſo on directly as in the other Siſters Caſes.

And then goes on. In Caſe any of my ſaid Daughters ſhall happen to die without Iſſue, then that Child's Part to go the Survivor; and after ſome Legacies given, deviſes all the Reſidue of his Real and Perſonal Eſtate to his Executors upon Truſt, to manage and improve the ſame for the Benefit of the Daughters, and thereout to pay in the firſt Place all Taxes, Legacies, Chief Rents, and other Rents and Services, and the Overplus, if there be any, as I doubt not but there will. I give and deviſe to my ſaid three Daughters, to be equally divided betwixt them, and makes two of the Defendants Executors, and ſoon after dies.

After his Death, the Plaintiff *Semphill* renewed his Addreſſes to the other Plaintiff his Wife, and the Executors having Notice of it, expreſſed their Diſlike thereof, and ſent the Plaintiff *Sarah* Notice thereof in Writing, and of her Father's Will, ſo that ſhe would be in Danger of forfeiting her Portion, if ſhe married without their Conſent, and they could not give their Conſent, becauſe they knew it was a Match their Father diſliked. Notwithſtanding, the Plaintiffs that lived at *Mancheſter*, about five Months ago Intermarried, the Plaintiff being an Officer, but a Gentle-

man of a good Family and Fortune, not at all inferior to the other Plaintiff.

And now this Bill was brought for the 1000 *l.* and to have a Discovery of the Deeds and Writings belonging to the Estate devised to the Plaintiff; and the Cause was heard on Bill and Answer only, and the Defendants, the other Sisters, insisted, by their Answer, on the Benefit of the Plaintiff's Fortune, in Case it were forfeited, and the Executors set forth the whole Matter, and submitted to do as the Court should direct, being indemnified.

The Chancellor *Lechmere*, by the Lord Chief Justice *King*, and Mr. Justice *Dormer*; and the Chief Justice and Chancellor were of Opinion, and the Decree was accordingly; that in this Case the Fortune was not forfeited by this Marrige without Consent; but Mr. Justice *Dormer* held it was.

The Reasons they gave were, that here there appeared no Intention throughout the Will to make it a Forfeiture; that if in any Cases whatsoever, such Clauses may be construed to be *in Terrorem*, they must be so here, for it seems to be nothing but a loose inconsiderate Way of expressing himself, and is only a cautionary Provision, that his Daughters should have the Consent of his Executors in their Marriage; but the Will is not at all coherent throughout, that tho' there is that Condition annexed to *Sarah*'s Fortune; yet it is totally omitted, as to *Elizabeth*, and in *Rebecca*'s it comes between the Devise of the Money, and the Devise of the Land.

Then 2*dly*, Here is no Devise of it over, tho' he had Occasion in two several Places of his Will to have taken it up again, and given it over, if that had been his Intent, or where he devises, if any of his Daughters die without Issue, he would have inserted, *or marry without such Consent*, if that had been his Intent, or at least, he would have taken Notice of it at the Close of his Will; but that he has not done neither.

And then the laſt Deviſe of the Overplus will not carry it, for that is, of the Overplus of the Reſidue of his Real and Perſonal Eſtate, after the Legacies juſt before mentioned were paid; beſides, he adds, if there be any Overplus, as he doubted not but there would, which ſhews, that he had no Thought of the 1000 *l.* for that was a Sum, and might be deviſed over in Caſe of a Forfeiture, with as much Security as it was given at firſt, and then he would not have ſaid, if there be any Overplus.

That theſe Clauſes in reſtraint of Marriage have never been taken favourably; that if there be no Deviſe over, they have always been held to be only *in Terrorem*, that otherwiſe Strangers Executors might run away with a great part of a Man's Eſtate from his Children.

That the Diſtinction between a Deviſe over, and where there has been no Deviſe over, has been taken in all Caſes, and was certainly a very good one; that tho' Lawyers knew it would be no Forfeiture, yet the Parties themſelves might not be ſo learned, and therefore it would be ſome Terror to them to venture to break it; but theſe Sort of Reſtrictions could hold no longer than 'till the Party came of Age, after which they would be intitled to their Fortunes, and might bring a Bill for Recovery of them.

Note, In this Caſe were cited *Fry* cont. *Porter*, 1 *Vent.* 300, 1 *Chan. Caſes* 122, Sir *Andrew Bellaſis*'s Caſe 346. *Floyd* and *Hughes*, Lord *Salisbury*'s Caſe.

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Term. S. Trinitatis,
1721.
In Curia Cancellariæ.

Case 346.
January 10.
A. devises 50 *l.* apiece to his two Sisters, and 50 *l.* to his Niece, and makes them three Executors, without disposing of the Residue of his Personal Estate, the Surplus shall be divided amongst the next of Kin, and shall not go to the Executors.

Farrington versus *Knightley*.

THIS was a Cause wherein my Lord *Chancellor* had taken Time to consider and see Precedents, and was this, one *Upton* of *Gray's-Inn*, a Batchellor, began his Will in Writing, with his own Hand, and thereby gave several Legacies, and gave the Defendants, who were two of them his Sisters, and one of them his Niece 50 *l.* apiece, and made them Executors; but before he had finished or signed his Will, he died, possessed of a considerable Personal Estate; and this being proved as a Testamentary Schedule, the Plaintiffs, as next of Kin, brought this Bill against the Defendants the Executors, for a Distribution of the Surplus; and the only Question was, Whether the Plaintiffs were intitled to such Distribution, or whether the Defendants the Executors should go away with it, and it was decreed for the Plaintiffs on View and Consideration of all the Precedents.

My Lord *Chancellor* was clear of Opinion, that Executors in these Cases were but Trustees, that if the Testator intended them the Surplus, could he not have easily have said so, that to give them the same Thing

twice over, would be abſurd, for the Legacies muſt come out of the Surplus.

That ſince the Statute of Diſtribution, the Succeſſion to a Perſonal Eſtate was as much eſtabliſhed as the Succeſſion to the Real Eſtate was before; that becauſe they are made Executors, they therefore muſt have the Surplus to their own Uſe, would be to conſtrue the Will by a Rule, which probably the Teſtator did not underſtand, for he might be ignorant of the Import of the Word Executor, or never intend by making them ſuch, to give them his Perſonal Eſtate; that here it would be the more unreaſonable, becauſe they had Legacies given them.

That he had looked into the Caſe of *Forſter*, *Munt*, and there was no Fraud at all in that Caſe in the Executors, tho' it had been greatly held there was.

That if *A.* and *B.* ſeverally make their Wills, and make *C.* Executor, and *A.* gives him the Surplus of his Perſonal Eſtate; but *B.* does not; and then *C.* dies Inteſtate; in this Caſe the Perſonal Eſtate of *A.* and *B.* ſhall go ſeveral Ways, for the Adminiſtrator of *C.* is admitted to the Adminiſtration of the Perſonal Eſtate of *A.* but the next of Kin to *B.* are to have Adminiſtration to him, and will be intitled to his Perſonal Eſtate; which proves *C.* as to that was but a Truſtee.

And a Caſe was cited of *Blackwell* and *Dry*, where a Man deviſed his Real and Perſonal Eſtate to his four Daughters, and their Heirs, Executors and Adminiſtrators; one of the Daughters died, and the Queſtion was, who ſhould have her Share; and it was decreed to go in the ſame Manner as a Real Eſtate to the ſurviving Daughter.

And in this Caſe was likewiſe cited the Earl of *Briſtol* cont' *Hungerford*, where Sir *William Baſſet* deviſed his Perſonal Eſtate to pay his Debts and Legacies, and gave 1000 *l.* apiece to his Executors; and it was agreed, that the Surplus ſhould go to the Repreſentatives of the next of

7 C Kin,

Kin: Alſo *Bayly* cont' *Powel*, *Randal* and *Rookey*, *Ward* cont' *Lant*, *Weſtmore* cont' *Jones*, *Batchelor* and *Searle*, Dutcheſs of *Beaufort*'s Caſe, *Edward* and *Eyles*, and *Paules* cont' *Smiths*; and my Lord *Chancellor* was of Opinion, that none of theſe Caſes are inconſiſtent with the general Rule he laid down; ſo that Executors are but Truſtees, and were to have nothing more to their own Uſe, than what the Teſtator plainly intended them as Legatees or Deviſees, and not the whole *Reſiduum*, by Virtue of the Executorſhip.

Caſe. 347.
15 *June*.
In Court Ld *Macclesfield*.

Sir *Harry Peachy* verſus Duke of *Somerſet*.

A Court of Equity won't aſſiſt a Copyholder againſt a Forfeiture, which is found ſuch at Law, unleſs in Caſes where a Compenſation can be made.

THE Plaintiff's Father was a Copyholder in Fee, under the Duke of *Somerſet*, of ſome Copyhold Lands of about 14 or 15 *l. per Ann.* and made a Surrender thereof to the Uſe of himſelf for Life, with Remainder to his firſt and other Sons, on his Marriage, in Tail Mail, with Remainder to himſelf in Fee; but it did not appear that there was ever any Admittance on the Surrender in the Father's Life Time: The Father was likewiſe ſeiſed of Freehold Lands adjoining the ſaid Copyhold Lands, wherein were ſome Quarries of Stone.

The Father in his Life Time made ſome Leaſes for Years of this Copyhold Land, not warranted by the Cuſtom of the Manor; and likewiſe carried on his Work from the ſaid Quarry of Stone out of his Freehold Lands into the ſaid Copyhold Lands, but had no Licence for making the ſaid Leaſe, or for working the ſaid Quarry in the Copyhold Lands.

After his Death, in the great Storm which happened in the Year 1703, ſeveral of the Trees ſtanding in the Copyhold Lands were blown down, and the Tops of all others broke off, ſo that the now Plaintiff, who was juſt come of Age, cut off, lopped the Tops of ſeveral others of the Trees, and ſome he quite cut down to make

make the Avenue to his Houſe the more uniform and regular.

It was likewiſe proved in the Cauſe, that he had made ſome Incloſure in the Copyhold Lands, whereby the ſame which before lay open and uninc1oſed was ſeparated and divided from the other, and theſe Things he had frequently done, notwithſtanding repeated Admonitions from the Defendant and his Agents to the contrary.

It appeared in the Cauſe, that the Plaintiff, who was a Perſon of Conſideration, had encouraged others of the Copyhold Tenants, to take the ſame Liberty, and expreſſed great Contempt for the Lord of the Manor, with Reſpect to his Authority over his Copyholders.

Upon which the Defendant brought his Ejectment, and had a Verdict at Law, as for a Forfeiture, and to be relieved againſt theſe Forfeitures, the Plaintiff now brought this Bill; and the only Queſtion was, Whether theſe were ſuch Sort of Forfeitures as a Court of Equity could, or ought to interpoſe in by way of Relief.

It was agreed, that for Non-Payment of Rent of Fines, or ſuch like Things, where a Value might be ſet on them, and a Compenſation made to the Lord of the Manor, for any Laches in Point of Time, it could; it was likewiſe agreed, that any Forfeiture committed by a Copyholder for Life, would not bind the Perſon in Remainder; but in the principal Caſe, as there was no Admittance upon the Father's Surrender, it was the ſame Thing as if no Surrender at all had been made, and that the Copyholder, who made ſuch Surrender continued to all Intents and Purpoſes, both with Reſpect to the Lord, and with Reſpect to Strangers, the ſame, as if no ſuch Surrender at all had been made; that he was to do Suit and Service, and to pay his Rent to the Lord, and might maintain an Action of Treſpaſs againſt any Stranger, notwithſtanding ſuch Surrender, and as if none at all had been made.

It

It was likewise agreed, that Conditions in Law, as those in the principal Case, were allowed to bind Infants, as well as Persons of full Age; and that no Notice was requisite to be given of them, tho' if it were necessary, here is express Notice given the Plaintiff to forbear several of those Acts.

And therefore, as to the principal Point it was urged, that if any Acts whatsoever could be a voluntary Forfeiture, these must be such, and that a Court of Equity ought not to relieve against them.

That the ancient Rule for the Jurisdiction of this Court was confined to those Sort of Cases, that is to say, to Frauds, Accidents, and Trusts; and this was by no Means within the Reason and Meaning of any of them.

That no Compensation could be made to the Lord for what had been done in this Case; that tho' it was true in all Cases whatsoever, some Sort of Compensation could be made, yet not such an one within the Meaning of that Rule wherein Compensation had been allowed; that therefore this differed exceedingly from the Cases of Forfeiture for Non-Payment of Rent, of Fines, or other Pecuniary Duties; and if the Court could Interpose in this Case, so they might with as much Reason, when a Tenant for Life or Years of Freehold Lands should take upon him to levy a Fine, or make a Feoffment in Fee; for in these Cases it may be said, that in some Cases a Compensation might be made to the Person in Remainder or Reversion, but that was never attempted, nor could it be so much as pretended, that the Court would relieve against Forfeitures of this Sort.

That the Reason of the Forfeiture was in Consideration of the Injury done to the Lord, that is, in the present Case, those Leases at Common Law being without Licence, might in Time be made Use of as Evidence to prove it a Freehold, that the lopping and topping of the Trees, for ever spoiled the Growth of them, and prevented their coming to be Timber.

3 That

That the carrying on the Quarry to the Copyhold Lands was the ſame Thing, as if it had been firſt open'd therein, which no Copyholder could do.

That the incloſing the Copyhold Lands one from another, might in Time deſtroy the Evidence of their being Copyhold, as it deſtroy'd the ancient Boundaries thereof, and ſo it would be to convert Meadow or Paſture Ground into Arable.

That no Caſe could be put, where the Court had relieved in Caſes of this Nature, that where a Leaſe was made of Church Lands, under a Proviſo, not to aſſign without Licence, this would not relieve againſt the Forfeiture, as it could not alter the Terms on which the Leſſor himſelf thought proper to part with his Lands, or Force a Tenant upon him in ſpight of his Teeth, indeed, if this were only by way of Conſent on the Part of the Leſſee, it might poſſibly be otherwiſe.

That in the principal Caſe, they were in Poſſeſſion of the Land, and had recovered a Verdict, and to take it away from them would be to alter the eſtabliſhed Courſe of the Law, and to make a new one, which they ſuppoſed a Court of Equity had no Power to do; and the Caſe of *Thomas* cont' *Porter*, 1 *Chan. Caſ.* 95, 96, was ſaid to be monſtrous; that the Lord, who had upon two Trials at Law recovered Verdicts, ſhould not only be obliged to account for the Meſne Profits, but alſo pay Coſts.

That this was not an Application to be relieved againſt the Rigour of the Law, or to relax the Law, but directly to make a new Law; and the Plaintiff by bringing this Bill, had admitted the Law to be directly againſt him, otherwiſe he might make Uſe of it as his Defence at Law.

That it would be of the utmoſt Conſequence to Lords, if the Plaintiff ſhould be relieved in this Caſe; for then it would be but endeavouring to keep theſe Things Secret for a conſiderable while, and in Time they would

grow into an Evidence of Freehold; or if the Tenant ſhould be found out, it would be only bringing his Bill here, and all would be ſafe.

My Lord *Chancellor* was clear of Opinion, that there was no Foundation for Equity to interpoſe, that it would be to alter the Nature of the Tenure, and the Terms whereby Copyholds ſubſiſted; that if this was a Forfeiture at Law, a Court of Equity had nothing to do with it, and that it was like the Caſe of a Feoffment made, or Fine levied by a particular Tenant, againſt which there could be no Relief.

That Copyholders were but Tenants at Will, tho' it were according to the Cuſtom of the Manor, that this entirely differed from the Caſe of a Forfeiture for Non-Payment of Rent, Non-Payment of a Fine; for there the Eſtate was but in the Nature of a Security for thoſe Sums, and the Lord might be recompenced in Damages and Coſts.

That to make a Leaſe for Years without Licenſe, was a Forfeiture, as it was a Determination of his Will; and tho' the Lord ſhould refuſe to grant ſuch Licence, yet the Tenant has no Remedy, nor would this Court compel the Tenant to grant ſuch Licence.

That tho' theſe Copyholds are mended by Time, and are in the Nature of an Inheritance, yet ſtill the Tenant is obliged to obſerve the Law and Cuſtom to which they are ſubject; that theſe Cuſtoms are in the Nature of a Limitation of an Eſtate, which determines upon the Breach of them; that unleſs there were ſome equitable Circumſtances in this Caſe, this Court cannot interpoſe, which would be to repeal and deſtroy the Law.

Note, In this Caſe Sir *Harry Peachy* in 1693, on his Marriage, ſurrendred theſe Copyhold Lands to the ſeveral Uſes in his Marriage Settlement, which were to the Uſe of himſelf for Life, Remainder to his firſt and other Sons ſucceſſively in Tail Male, Remainder to himſelf in Fee; and he had Iſſue a Son not yet of Age, who was Complainant with him in this Suit; but there

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had been no Admittance at all upon this Surrender, for want of which it was clearly held, that Sir *Harry Peachy* continued, and was to be considered as absolute Tenant to the Duke of the Copyhold Lands, for which was cited *Cro. Jac.* 403, and *Bulst.* and *Yelv.* that consequently Sir *Harry* was but Trustee for his Son of the Inheritance of those Lands; but the whole Inheritance *quoad*, the Lord was in Sir *Harry*, and any Act of Forfeiture done by him would bind the Inheritance, because there must always be some Tenants to answer for the whole; for if there had been an Admittance of the Father for Life, and of the Son in Remainder, because they come in as it were by two distinct Grants from the Lord himself; and therefore, the Acts of one will not bind or effect the other; but 'till there is an Admittance on such Surrender, the Lord is not bound to take any Notice of it; but the Tenant continues to all Intents and Purposes the same Estate that he had before; and the rather, because that he had no Means to compel him to come in, and be admitted on such Surrender; and whether the Son of Sir *Harry* will ever apply to be admitted on the Surrender, may be incertain, and consequently 'till he does, Sir *Harry* is the only Tenant the Lord can take Notice of, and his Acts will bind and affect the whole Inheritance; therefore, if he should commit Treason, it would be a Forfeiture to the Lord of the whole Inheritance; and so it would be, if any other Trustee of a Copyhold; and the Lord would not be bound by the Trust, nor would the Lands in his Hands be subject thereto. For the *Cestui que Trust*, is not Tenant, nor can any Acts of his, either of Treason, Felony, or otherwise, charge or affect the Copyhold Lands. Indeed, if he should bring his Bill in this Court against his Father, and the Duke to compel an Admittance pursuant to the said Surrender and Settlement, it might come then to be considered how far this Forfeiture of his Father's would bind him; but at present nothing of this appears in the Case, nor can the Court take Notice of it, but in Regard of that Surrender,

render, the Bill as to him was dismissed without Prejudice, and as to Sir *Harry*, it was dismissed absolutely; but an Injunction to stay his taking out Execution on the Judgment in Ejectment, was granted, because it was insisted, that even at Law several of those Acts were no Forfeitures; and therefore a Trial at Bar was directed on a new Ejectment to be brought to wait the event thereof.

In this Case were cited a Case of *Con* and *Hickford*, before Lord Chancellor *Harcourt*, where the Court would not relieve against a Forfeiture of a Copyholder, even for permissive Waste for letting a Copyhold House tumble down for want of Repairs; but in that Case the Reason was, because it was an absolute Refusal to repair it for several Years together, after repeated Admonitions and Presentments of the Jury of the Waste; and therefore it was equal to voluntary Waste: And the Case of *Edmore* and *Craven*, where a Quaker refusing to swear Fealty, the Lord seised as for a Forfeiture; yet upon the Circumstances of the Case, the Court gave Relief; likewise were cited 1 *Rol. Abr.* 851, *Owen* 641, *Leon.* 126, 2 *Vent.* 352, *Co. Lit.* 53, 68, and the Case of *Nash* and the Countess of *Derby* before Lord Keeper *Wright*, where Relief was against a Forfeiture for cutting down Timber by a Copyholder; but the Reason of that Case was, because the Timber was employ'd about the Repairs of the Copyhold; and there was only a Mistake, whether the Steward, or Woodman should set out the Timber.

Note, The principal Case held three Days, and was solemly debated; but as to the principal Point, whether this Court could relieve against a voluntary Forfeiture; My Lord *Chancellor* was clear, that it could not, and that it would be even to alter and repeal the very Law of Copyholds, which tho' now supported by Custom, were at first established by Act of Parliament, as all other Parts of the Common Law were, 'till the Records of them came to be lost, tho' against a Forfeiture for permisive Waste only, Relief may be given.

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Sir *Harry Hick* verſus *Phillips*.

Caſe 348.

A. Articles with *B.* for the Purchaſe of an Eſtate of 180 *l. per Ann.* for which he was to give 35 Years Purchaſe, upon granting and conveying to him, and pays 50 *l.* in Part; but diſcovering, that 30 *l. per Ann.* of the Lands were Copyhold, refuſed to go on. On a Bill by *B.* Equity won't decree a Specifick Execution of this Agreement, being unequitable; but will Order the 50 *l.* to be paid back.

THE Defendant in *June* laſt enter'd into Articles with the Plaintiff, for the Purchaſe of an Eſtate of 180 *l. per Ann.* for which he was to give 35 Years Purchaſe, upon executing Conveyances, and the Plaintiff covenanted to grant and convey the Lands to him, upon Payment of the Purchaſe Money; after the Defendant diſcovering, that about 30 *l. per Ann.* of theſe Lands were Copyhold, refuſed to go on with his Bargain; and hereupon the Plaintiff brought his Bill for a Specifick Execution of the Articles; and the rather, for that the Defendant had paid 50 *l.* in Part, upon executing the Articles.

It was argued for the Plaintiff, that there was no Diſability on his Part to perform the Agreement, that the Conveyance agreed to be made, muſt be conſtrued *ſecundum Subjectam Materiam*, that is, the Freehold by Conveyance at Common Law, and the Copyhold by Surrender in the Lord's Court, which was the proper Conveyance for that Sort of Land; and therefore the Plaintiff being willing to perform his Part, the Defendant ought to be bound to compleat his Part likewiſe.

But on the other Hand it was argued and decreed by my Lord *Chancellor*, that the Plaintiff ſhould have no Aſſiſtance in a Court of Equity for carrying this Agreement into Execution; that they were not bound to aſſiſt Contracts, which were harſh and unequitable, or were attended with ſuch Circumſtances, as would be a hardſhip on the Defendant; that this was a Caſe proper for a Jury at Law, to conſider of, where they might mitigate or moderate the Damages according to what the Circumſtances ſhould appear to be; but this Court could take no Advantage of ſuch Circumſtances, but muſt either decree an Execution of the Agreement, or diſmiſs

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the Bill; and therefore the Plaintiff ought to be left to make the moſt he could of it at Law; that the Plaintiff in ſtrictneſs could not perform his Part of the Agreement, for Part of the Lands being Copyhold, could not be convey'd within the Meaning of theſe Articles, the Words thereof being all proper for Conveyances at Common Law only; and this being Copyhold, could not be ſo convey'd, unleſs it had been infranchiſed, and the Caſe of *Young* and *Clerke* was cited, wherein the over Value of the Land was the Reaſon the Court would not decree an Execution of the Leaſes; and for the ſame Reaſon ought not, for the over Value of the Money in this Caſe, and therefore diſmiſſed the Bill, and ordered the 50 *l.* to be paid back, but without Coſts.

Note, The Defendant ſwore in his Anſwer, he had no Notice of any Part of theſe Lands being Copyhold at the Time of the Articles; but there was no Proof of any Fraud or Endeavours to conceal its being Copyhold from the Defendant; but only a general Contract to convey all thoſe Lands, without diſtinguiſhing, whether Freehold or Copyhold.

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DE
Termino S. Mich.
1721.
In Curia Cancellariæ.

Bowaman versus *Reeve*. Case 349.

A Native of *Holland* possessed of a Personal Estate, both there and in *England*, and making his Will in *Holland*, how it must be construed, so as to take Effect, notwithstanding the Difference of the Laws of each Country.

THE Defendant's Testator being seised of a considerable Estate in *Holland*, consisting in Houses, Goods, Merchandizes, Jewels, and other Effects, and being a Native of that Country, and residing there, sends for a Notary Publick to make his Will, and according to the Custom of the Country, an Instrument is drawn up in the Nature of a Will, and executed, whereby the Testator gives some of the Houses to the Minister of the Presbyterian Meeting there, and others to the Minister of the Reformed Church there; and then gives all the Residue of his Goods, Chattels, Plate; Jewels, and other Effects (which are very particularly enumerated) to the Defendant, whom he makes his universal Heir and Executor, and dies possessed of a very considerable Personal Estate in *England*, besides what he had in *Holland*.

By the Laws of that Country, there is no Distinction between Real and Personal Estate, but both are equally liable to the Satisfaction of Creditors; and therefore, after the Testator's Death, his Creditors in *Holland* took

Possession of those Houses so specifically devised, as aforesaid, for the Satisfaction of their Debts; and tho' there were other considerable Effects in *Holland*; yet the residing Devisee and Executor would not intermeddle therewith, because by the Law of that Country if he does, he must take upon him the Payment of all the Testator's Debts, whether they exceed or fall short of his Assets; but he proved the Will here in *England*, and by Virtue thereof, possessed himself of all the Testator's Estate and Effects here; and thereupon, the Plaintiffs, who were Devisees of the Houses in *Holland*, brought this Bill against the Executor and Residuary Legatee to have a Recompence in Proportion, to the Value of the said Houses.

And my Lord *Chancellor* decreed an Account and Satisfaction accordingly; and tho' it was urged, that those Houses by the Law of this Country being liable to the Payment of Debts, and therefore the Specifick Devisees must take them liable thereto, and that the Testator never intended to give them otherwise, or to give them any other Part of his Estate; and that they must take them *cum onere*; yet he held, that they should have such Account and Satisfaction as aforesaid.

And my Lord *Chancellor* further said, that there was no Difference between a Devise of these Houses, and a Devise of a Horse, or a Term for Years here; and that in those Cases, if the Creditors bring an Action, or take out Execution upon a Judgment against the Executors, and take the Horse, or Term for Years in Execution, which they may do, notwithstanding the Specifick Devise thereof, yet most certainly the Executor, or Residuary Legatee shall be obliged in Equity to make them a Recompence; for they are to have nothing to their own Use but the Residue, after the Debts and Legacies paid, and this *Residuum* is chargeable with the Debts; tho' as to the Creditors, they must take what Part they think fit in Satisfaction of their Debts, and the enumerating of Particulars in this Devise of the *Residuum*, makes

it no more a Specifick Devise, than if he had only said in general, all the rest of his Goods and Chattels, or such like Words; and therefore this *Residuum* liable to the Payment of Debts, altho' the Creditors thought fit to fix on other Parts of his Estate, and thereby deprived the Specifick Legatees of what was intended them.

DE
Termino S. Hillarii,
1721.
In Curia Cancellariæ.

Case 350. **Downnam & al' versus Matthews & al'.**

A. a *Clothier*, and *B.* a *Dyer*, had mutual dealings in the Way of their Trade, which were carried on for several Years, without Payment of Money on either Side. *B.* dies Intestate, and indebted to others by Specialties, who as principal Creditors take out Administration to him, and sue *A.* at Law. Equity will enjoin the Action, and order an Account; and that *A.* shall be allowed by Way of Discount what was due to him from *B.*

THE Plaintiffs were Clothiers, and had mutual Dealings with one *Biss*, to whom they sold and delivered several Cloths, and *Biss* set off the Money owing to them in dying of Cloths: These Dealings had been carried on for several Years, without Payment of Money on either Side; but the Debts on one Side were paid off against the Debts on the other Side, *Biss* was likewise indebted to the Defendants for Cloths, and other Goods, which he had bought of them, and on stating Accounts between *Biss* and the Defendants, he appeared to be indebted to them in the Sum of 300 *l.* and upwards, for which he made them a Mortgage, and becoming after indebted to them in 200 *l.* and upwards, he did for securing of that Money enter into a Bond, and confessed a Judgment to them. *Biss* died Intestate, and indebted likewise to several other Persons by Bonds and other Specialties: The Defendants took out Administration as principal Creditors, and finding several Sums as due and owing from the Plaintiffs, demanded Payment thereof: The Plaintiffs on the other Hand had several

Sums of Money due, and owing them from the Inteſtate, and offered to account with the Defendants, and pay what ſhould be due on the Ballance thereof; but inſiſted to retain what was owing them towards Payment of what was owing from them to the Inteſtate, as they had always done in his Life Time; upon this the Defendants being both Adminiſtrators and Creditors by ſpecialty, as aforeſaid, thought themſelves intitled to a Preference in Payment before the Plaintiffs, who were at moſt but Creditors by Simple Contract; and thereupon the Defendants refuſed to diſcount what was due to the Plaintiffs from the Inteſtate, out of what was due from the Plaintiffs, to the Inteſtate; but inſtead thereof brought Actions at Law againſt the Plaintiffs for the Money owing by them to the Inteſtate: And to be relieved againſt theſe Actions, and that they may be allowed to ſtop their own Debts out of what was owing by them to the Inteſtate, the Plaintiffs brought this Bill; and the only Queſtion was, Whether the Defendants ſhould be obliged to enter into the Account.

It was argued by the Defendants, that they ought not, that they were not only Adminiſtrators, but alſo Creditors, and Creditors too by Specialty; and therefore had a right to recover and retain towards Payment of their own Debts, preferable to the Plaintiffs, who were only Creditors by Simple Contract; that this was a legal Advantage they were intitled unto, and that a Court of Equity ought not to take it from them; however hard this might ſeem as againſt the Plaintiff; yet the bare Hardſhip of it could be no Ground for Relief in a Court of Equity; that before the late Statute it was the ſame in the Caſe of Bankrupts, that the Debtors to the Bankrupt ſhould be obliged to pay whatſoever they were indebted to him, without the Liberty of retaining what he was indebted to them; and tho' this is now alter'd, yet the preſent Caſe remains as at Law, and the Defendants ought not to be deprived of it by a Court of Equity; and that to do this would be to invert and alter the Courſe

A Court of Equity won't deprive one Creditor of a legal Advantage in Favour of another.

Course of Administration, which allows that Debts of a superior Nature should be paid preferable to Debts of an inferior Nature, as the Plaintiffs are.

Where stoppage will be allowed as good Payment.

But Lord *Chancellor* said, that tho' generally stoppage was no Payment, and that there were some Cases where this could not be done, as a Man could not stop his Rent for Money owing to him, or a Bond toward Satisfaction of a Simple Contract Debt; yet in Cases of this Nature, where it appeared, that the mutual dealing between the Intestate and the Plaintiffs were carried on for several Years in this Manner, without Payment of any Money on either Side, it was a strong presumptive Argument of an Agreement to this Purpose, and that without such Liberty of retaining against each other, they would not have continued on their Dealings; but if it had been insisted upon by either Party; that the other should not be allowed to set off his Debt out of what was owing by him to the other, as they could, that this would have soon broke off all Dealings between them; that this was the constant Use among Merchants and Traders, and the only Reason which induced them to take such Goods as they wanted of one, rather than another, was, that such other Person in his Way should take of them the Goods he wanted, and to set off one against the other; that the Statute of Bankrupts which directed Accounts to be taken in such Manner, did it because it was reasonable to have been so before, or else you must suppose, that the Parliament made an unreasonable Law; that if there was but the least Handle for directing such an Account, it ought to be done, as if even in Case of a Bond, the Interest had not been paid, but cast up and allowed in Goods, that this would intitle them to retain the whole against each, as the Account should come out, that the Representatives of each Party would be in no better Condition than the Parties themselves would have been, in Case they had been living, and no Pretence could have been to let the one go on for the recovery of his Debt, without allowing

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the other to retain his own Debt thereout; and therefore sent it to a Master to take the Account accordingly, and ordered the Plaintiffs Costs out of the Assets.

DE Termino Paschæ, 1722.

In Curia Cancellariæ.

Ivy versus *Gilbert*.

Case 351. *April* 14. Lord *Macclesfield*.

On a Marriage Settlement, on failure of Issue Male a Term for Years is created and vested in Trustees, for raising a Sum of Money for Daughters, tho' there is no particular Time appointed for raising it; and the Words of the Power are, that the Trustees shall raise it out of the Rents, Issues and Profits of the Lands, as well by leasing or demising of the same for 21 Years, or three Lives: yet may the Trustees, if there be Occasion, by Way of Anticipation, Mortgage the Lands, or raise the Money any other Way.

ONE *Roger Pomfrey* being seised of the Estate in Question, which was about 160 *l. per Ann.* in the *West* of *England*, in 1651, makes a Settlement thereof on his Marriage, to two Trustees, and their Heirs, to the Use of himself for Life, Remainder to Trustees during his Life to support Contingent Remainders, Remainder to his Wife for Life for her Jointure, Remainder to the first and other Sons of that Marriage in Tail Male, Remainder to two other Trustees for the Term of 120 Years, Remainder to his own right Heirs.

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The Term of 120 Years was declared to be upon Trust, that if there should be no Issue Male of that Marriage, and one or more Daughters, then that the Trustees, by and out of the Rents, Issues and Profits of the said Premisses, as well by leasing, or by demising the same for 21 Years, or three Lives, or for any Term or Number of Years determinable on three Lives, not exceeding 120 Years, to raise and pay for the Portions of such Daughters, if more than one, the Sum of 1500 *l.* equally between them; and if only one such Daughter, then the said Sum of 1500 *l.* to such only Daughter, without limiting any Time for the Payment thereof, and without any Proviso for determining the said Term, on Payment of the Money.

The Marriage took Effect, and the Wife died some Time after without Issue Male, leaving only one Daughter. *Roger Pomfrey* lived until 1718; but in 1706 he made a voluntary Settlement of the Estate in Question, to the Use of himself for Life, Remainder to *Hugh Pomfrey* his Nephew for Life, Remainder to Trustees during the Life of his Nephew, to preserve Contingent Remainders, with Remainder to the first and other Sons of the said Nephew in Tail Male successively, Remainder to the Defendant *John Gilbert*, for Life, with Remainder to Trustees during his Life, to support Contingent Remainders, with Remainder to his first and other Sons in Tail Male, with several Remainders over.

Soon after the Death of *Roger Pomfrey*, *Joan* his only Daughter (the Trustees for the Term of 120 Years, being both dead) took out Letters of Administration to the surviving Trustee, and then married, and her Husband having Occasion for her Portion, they applied to *Hugh Pomfrey*, who had been in Possession of the Estate about three Years, to have the same paid; but he, not being able to pay the same, joined with her and her Husband in a Mortgage of the Remainder of the Term of 120 Years to the now Plaintiff, in Consideration of 1500 *l.* by him lent and advanced to the Husband,

with a Covenant from *Hugh Pomfrey* for Payment of the Money.

It appeared in the Cause, that *Hugh Pomfrey* had paid the Intereſt of the 1500 *l.* from the Death of *Roger*, firſt to *Joan* herſelf, and afterwards to the Plaintiff from the Time of the Mortgage, which was in 1712, to his Death, having received the whole Profits of the Eſtate during his Life, and having made him, and one of the Defendants his Executors; and on the Death of *Hugh Pomfrey* without Iſſue, the Defendant *Gilbert*, as next in Remainder for Life, entred on the Eſtate in Queſtion; and the Repreſentatives of *Hugh*, not having Aſſets to pay the 1500 *l.* The Plaintiff now brought this Bill againſt the Repreſentatives of *Hugh*, for a Diſcovery of Aſſets, and againſt the Defendant *Gilbert*, that he might redeem or be foreclosed.

For the Plaintiff it was inſiſted, that he was an Honeſt Creditor, and having lent his Money, his Application to this Court was proper; that tho' the Clauſe which impowers the Truſtees to raiſe the Portions ſeems imperfect, yet it appears, that the Truſtees might mortgage the Premiſſes, and that plainly there are ſome Words wanting, for after a Direction to raiſe the 1500 *l.* out of the Rents, Iſſues, and Profits, it follows, as well by *demiſing*, *leaſing*, &c. and there is nothing after it to anſwer, as *by ſome other Way*, or at leaſt this ought to be ſuppoſed in this Manner, *viz. out of the Rents, Iſſues, and Profits as well (as) by demiſing, leaſing,* &c. and that ſome other Parts of the Deed ſeemed to explain it in this Senſe, and that the Truſtees, or the Repreſentatives of the Survivor of them (which was *Joan* herſelf) had good Power to Mortgage the Term for raiſing the Money, as it had been frequently ſettled in this Court, that where a Sum of Money was to be raiſed out of the Rents, Iſſues, and Profits of an Eſtate; that if the ordinary annual Profits would not do it, that they might mortgage or ſell the Term itſelf; and this plainly

plainly appears to have been intended for a Portion for *Joan*; and if ſhe had married ſooner, might have been greatly Inconvenient to her, if ſhe muſt have ſtaid 'till it could have been raiſed out of the annual Profits.

Lord *Chancellor*. That the natural and primary Interpretation of theſe Words, *out of the Rents, Iſſues, and Profits*, was out of the Rents, Iſſues, and Profits as they aroſe, and not by Way of Anticipation; but becauſe this might be ſometimes greatly inconvenient where Proviſions were limited to be paid at ſuch a Time, therefore the Court had extended the meaning of the Words in ſome Caſes, and to anſwer ſome particular Purpoſes; that they ſhould likewiſe comprehend the Profits of the Term, by Way of Anticipation, as the Land and the Profits of the Land were the ſame Thing, and this he thought, which at firſt was introduced to ſerve a particular Purpoſe on ſome particular Circumſtances, came by Degrees to be extended to a kind of a general Rule; but this he ſaid, was only where a particular Time was appointed for the raiſing and paying of the Money; and it appeared plainly, that the ordinary annual Profits of the Land would not be ſufficient to raiſe it within the Time, there they had been allowed to raiſe it by Way of Anticipation of the Profits by Way of Mortgage; but in this Caſe there was no particular Time appointed for the raiſing of this 1500 *l.* and therefore no Occaſion to anticipate the Profits of this Term for that Purpoſe.

He further obſerved, that here was no Power to raiſe the 1500 *l.* by way of Anticipation of the Profits for more than 21 Years, or three Lives, or any Number of Years determinable upon three Lives, and not for the whole 120 Years for the Limitation of demiſing; leaſing for thoſe Terms would be idle, and to no Purpoſe, if they were at Liberty on the firſt Words, out of the Rents, Iſſues, and Profits, to have mortgaged or

ſold the whole Term, becauſe that included and comprehended all other inferior Ways of raiſing it by Demiſe or Leaſe, by any leſſer Term.

Then as to the Objection, that this was like the Caſe of a Mortgagee, who ſuffers the Mortgagor to continue in Poſſeſſion, and Receipt of the Rents and Profits, that this does not Prejudice his Title, but that he may at any Time after, whenever he thinks fit, bring his Bill to foreclоſe, and the Rents received by the Mortgagor in the mean Time, ſhall not go in Part of Satisfaction, even tho' there were other Incumbrances behind it.

And therefore my *Lord* was of Opinion, and decreed in this Caſe, that the Money being to be raiſed out of the annual Profits as they aroſe, that the Receipt of *Hugh Pomfrey*, the Tenant for Life, was the Receipt of *Joan* herſelf, as to thoſe in Remainder; and the Plaintiff ſtanding in the Place of *Joan*, who by taking out Adminiſtration to the ſurviving Truſtee, had the legal Eſtate of this Term, and was alſo *Ceſtui que Truſt* of it; and the Plaintiff by taking an Aſſignment of the Term ſtands in her Place, as to the Remainder Man, and conſequently the Profits which were received during his Life, ſhall go towards Satisfaction of the 1500 *l.* and what ſhall appear to have been unraiſed during his Life, to be charged on the Remainder, tho' as againſt the Repreſentatives of *Hugh*, by Reaſon of this Covenant for Payment of the Money, the Plaintiffs muſt have an Account, and his Aſſets, as far as they will extend, to be applied towards Satisfaction; and as to the Profits received by *Hugh*, before his joining in this Mortgage, his Aſſets, by Reaſon of this Covenant which makes it a Debt by Specialty, to be liable to make the Defendant Satisfaction likewiſe, as to thoſe Profits, otherwiſe my *Lord* was of Opinion, that they ſhould have been applicable to recompence the Defendant with what his Eſtate was chargeable with, more by reaſon of *Hugh*'s

applying those Profits to his own Use, as a Debt by simple Contract; but the Covenant with the Plaintiff makes it a Debt by Specialty, which must take Place, and decreed accordingly; tho' he agreed, that where a Sum of Money was to be raised out of the Rents and Profits, and paid at a certain Time; that they may be raised by Way of Mortgage on those Words, which was still but out of the Profits, tho' by Way of Anticipation of them; and that where Lands were charged with Debts or Legacies, and then devised to one for Life, with Remainder over, that each Estate should only bear its own Burthen, and not the whole Profits be applied as they arose, which would defeat the particular Estate; and 'till such Mortgage or Sale, it was sufficient for the Tenant for Life to keep down the Interest, but not in the principal Case, where from the Nature of it the 1500 *l.* was to be raised out of the Profits, as they are; and the Tenant for Life should not be at Liberty to throw the whole Burthen upon those in Remainder; but decreed likewise, that what might have been by letting of Leases, according to the Power, by Way of Fine, if *Hugh* had apprehended his Estate chargeable with this Money, and so had taken the Benefit of making such Leases, that they should be accounted for by the Remainder Man, the Defendant.

Case 352.

Beech versus *Crull*.

April 29. Lord *Chancellor* on Demurrers.

THE Plaintiff bought 500 *l.* third Subscription of the Defendant, at 205 *per Cent.* Premium, for which he paid in ready Money 1525 *l.* and the Defendant at the same Time gave the Plaintiff a Bond to deliver him 400 *l.* in the said third Subscription, when the Receipts should be delivered out of the same by the Company; and no Receipts being delivered out, this Bill was brought to have the Money refunded, the Plaintiff by his Bill offering to deliver up the Bond; the Defendant

Defendant demurred to the Plaintiff's Bill for want of Equity, and by way of Anſwer offered to transferr to him the Stock given by the Company for the 500 *l.* paid in upon the Subſcription, and the Demurrer was allowed.

My Lord *Chancellor* ſaid, the Plaintiff's Equity was, that he was now to pay but 209 *per Cent.* for this Subſcription, and complains, that he had not the Receipt delivered out, which would have obliged him to pay 1000 *l. per Cent.* and ſaid, there was no Colour in the World to demand back his Money; but he muſt take back the Stock given by the Company in Lieu of it, as he agreed to ſtand in the Seller's Place, and would have been glad to do ſo, if it had proved an advantageous Bargain, ſo muſt he too now, that it comes out to be otherwiſe; but ſaid, that the Plaintiff might proceed at Law, if he thought fit, upon his Bond, and make the beſt of it there.

Dawes verſus *Ferrars.*

Caſe 352. *Eodem Die.*

One deviſes to his Wife for Life, Remainder to his Grandaughter, who was Heir at Law, for Life, Remainder to his own Heirs Male; a Nephew, altho' he be next Heir Male, cannot take by Virtue of this laſt Limitation, not having both Parts of the Deſcription verify'd in him.

A Man by his Will deviſes his Eſtate to his Wife for Life, Remainder to the Defendant, who was his Grandaughter, and Heir at Law for Life, Remainder to his own Heirs Males, and the Plaintiff and Heir Male brought this Bill againſt the Defendant, for an Injunction to ſtay Waſte; the Defendant demurred, for that the Plaintiff had no Title, being only Male, but not Heir, the Defendant herſelf being the Teſtator's Heir; and therefore the Plaintiff could not take by Purchaſe, according to *Co. Lit.* 19, and ſeveral other Books; and this differs from *Brown* and *Barkham*'s Caſe in this Court, for there the Limitation was to the Heirs Male of the Grandfather, ſo was *quaſi*, an Eſtate Tail in the Grandfather; but here it is of a Fee-Simple, which none can take, who has not both Parts of the Deſcription in him.

Lord

Lord *Chancellor* ſaid, this had been ſettled in all the Courts of *Weſtminſter-Hall*; and therefore it was dangerous now to ſhake it, tho' he thought *Shelly*'s Caſe not agreeable to Reaſon, and *Anderſon* who reports the ſame Caſe ſays, the Judges gave no Reaſon at all for their Opinions, tho' Lord *Coke* had made ſo long a Report of their Arguments; but however weak it was at firſt, the Law has been taken accordingly ever ſince; and it is dangerous to remove ancient Land Marks; and ſaid, it was no Matter what the Law was, ſo it be known, and ſaid, why don't you bring your Action of Waſte, and aſcertain the Will at Law, ſo the Demurrer was allowed.

DE
Term. S. Trinitatis,
1722.
In Curia Cancellariæ.

Lady *Whetstone* and *Sainsbury*.

Case 354. *July* 10. At Lord *Chancellor's* on Pleas and Demurrers.

Husband and Wife by Marriage Settlement, are made Tenants for Life, Remainder to their first and other Sons of the Marriage successively in Tail Male; after the Birth of their eldest Son, and 7 other Children, they by Lease and Release, and Fine, Mortgage the Lands, this is a Forfeiture, and the Mortgagee must lose his Money.

ON the Marriage of the Defendant's Father, the Estate in Question was settled on the Father for Life, Remainder to the first and other Sons of the Marriage successively in Tail Male, with other Remainders over, the Defendant was the eldest Son of that Marriage, and there were seven or eight other Children; after the Birth of all those Children, the Father and Mother having Occasion for about 300 *l.* make a Mortgage of this Estate, which was done, by way of Lease and Release, and Fine, *come ceo*, &c. this Mortgage Money, by the Addition of other Moneys lent, and Interest from Time to Time increased, 'till at last it came to 700 *l.* and then it was assigned to the Plaintiff; and another Lease and Release, and Fine were levy'd and executed by the Husband and Wife, for the making good of this Assignment; the Husband died, and this Bill was brought against the Widow and eldest Son, that they might redeem, or be foreclosed, the Mortgage Money being near the Value of the Estate, and to be relieved against the Forfeiture; the Defendant the Son

pleaded the Marriage Settlement of his Father and Mother, whereby they were but Tenants for Life, and insisted on the Forfeiture.

My Lord *Chancellor* allowed the Plea, and said, this was a Contrivance to destroy the Settlement, and disinherit the Son, and said, he had declared his Opinion before, in Cases of this Nature; that there could be no Relief, particularly in the Case of Sir *Harry Peachy* and Duke of *Somerset*, so the Plaintiff lost her whole Money.

Case 355.

Anonymous.

Part of the Proprietors of an Undertaking may bring some others of them to an Account, without making all the Members Parties, especially, if they sue on Behalf of themselves, and all the rest.

THIS was a Bill brought by the present Treasurer and Manager of the *Temple-Mills* Brass Works, in Behalf of themselves, and all others Proprietors and Partners in the first Undertaking, except the Defendants, who were the late Treasurers and Managers, being about 13 in Number, and was to call them to an Account for several Misapplications, Mismanagements, and Imbezilments of the Copartnership in the late *South-Sea* Times, to the Value of 50,000 *l.* and upwards, the Copartnership consisted originally but of 18 Shares; but those 18 Shares in the Year 1720, were split and divided into 800.

The Defendants demurred, for that all the rest of the Proprietors were not made Parties, and so every one had the same Right to call them to an Account, and then they might be harrassed and perplexed with multiplicity of Suits; but the Demurrer was disallowed.

1*st.* Because it was in Behalf of themselves and all others the Proprietors of the same Undertaking, except the Defendants, and so all the rest were in Effect Parties.

2*dly*, Because it would be impracticable to make them all Parties by Name, and there would be continual Abatements by Death, and otherwise, and no coming at Justice, if all were to be made Parties.

Mentney versus *Petty*.

Case 356. *June* 28. At the *Rolls*. The Difference between the Civil and Canon Law, in the Computation of the Degrees of Proximity, the former to be the Rule in the Construction of the Statute of Distributions.

THIS was a Case wherein the Master of the *Rolls* had taken Time to consider, and give Judgment, in Relation to the Distribution of an Intestate's Estate, and he said, the Rule to be observed in these Cases, was to be taken from the Civil Law, and not from the Common Law, between which there was a wide Difference in the Computation of the Degrees of Proximity; for the Canon Law, prohibiting Marriage between Relations, 'till after the fourth Degree, that they might exclude as many as possible from the Liberty of Marriage within those Degrees, without a Dispensation, reckon all in the direct ascending or descending Line, and those in the collateral Line corresponding with them to be but one Degree; as for Instance, Father or Mother, Uncle or Aunt make but one Degree; so Grandfather or Grandmother, Great Uncle, or Great Aunt make but two Degrees; but by the Civil Law, the Father or Mother make one Degree, the Grandfather or Grandmother two Degrees, and the Uncle and Aunt three Degrees; so that the Grandfather or Grandmother in the Distribution of an Intestate's Estate, shall be preferred before the Uncle or Aunt, as being nearer of Kin, within the Rules of Computation, or the Law of Proximity by the Civil Law; and so it was decreed by my Lord Chancellor *Cowper*, in the Case of *Duppa*; for the Grandmother against the Uncle or Aunt; but if you go one Degree further, and reckon to the Great Grandfather or Grandmother, they are in equal Degree with the Uncle or Aunt, as they are in the third Degree in direct Lines with the Uncle or Aunt, who are in the third Degree in the Collateral Line; for you must reckon thro' the Grandfather or Grandmother, to come to the Uncle or Aunt, and then they are in just the same Degree of Remove from the Nephew or Niece in

the

the collateral Line, as the Great Grandfather or great Grandmother are in the direct ascending Line, and consequently being in equal Degree of Kindred, by the Rules of Computation of the Civil Law, are equally intitled to the distributive Shares with the Uncle or Aunt.

And he said, that the Statute of Distributions was penned by a Civilian, and except in some few particular Instances mentioned in the Statute, is to be governed and construed by the Rules of the Civil Law; and his Honour cited the Case of *Carter* and *Crawley* at the End of *Raym. Rep.* and several Books of the Civil Law, where this Manner of computing the Degrees is expresly taken Notice of and explained.

Case 357. *Ante. July* 18.

Kemps versus *Kelsey*.

A Man who marries a Freeman of *London's* Daughter without his Consent, joins with his Wife in a Release to the Father, in Consideration of a 100 *l.* of all their Right to his Personal Estate; after his Death, this shall bar them of their Customary Share.

THE Defendant's Testator was a Freeman of *London*, and had several Children, the Plaintiff married one of his Daughters without his Consent; but some Time after the Marriage, the Father agreed to give the Plaintiff 100 *l.* provided he would Release whatever customary Share he might be intitled to of the Father's Personal Estate after his Death; and it was proved in the Cause, the Father said he would not leave the Plaintiff the less for it, and that it was what he himself had done upon his own Marriage; accordingly the Defendant and his Wife acknowledged the Receipt of this 100 *l.* and the Husband's Covenant, that he does and will accept it in full of whatever customary Share he may be intitled to in Right of his Wife out of the Father's Personal Estate.

The Father after made his Will, and having only two Daughters, the Plaintiff, and one other married to the Defendant; he devises 400 *l.* to the Defendants, to be put out at Interest for the Benefit of the Plaintiff's Wife, for Life, and after her Death gives this 400 *l.*

to the Defendant, it was computed that the Plaintiff's Orphanage Share would have amounted to 400 *l.* or thereabouts.

And this Bill was now brought to have an Account of the Testator's Personal Estate, and to be let into their Share of the Orphanage Part, notwithstanding the said Release and Covenant. For the Plaintiffs it was insisted, that there was a great deal of Difference between this Case, and a Woman's contracting before her Marriage with a Freeman, as to her customary Share; that she was at Liberty, whether she would marry or not; and therefore, whatever Contract she made before Marriage to exclude herself of any Part of his Personal Estate, ought to be binding, and was always looked upon as a Compounding for her Customary Share; but a Child was a Child, whether she would or not, that it was not a Matter of her own Choice; and therefore, an Act of this Kind was to be looked upon as proceeding from the Awe and Influence of a Parent, and ought to be no farther binding than it was just; and if it were otherwise, she might for 100 *l.* or a lesser Sum, be excluded from five or ten Times as much, or perhaps a great deal more.

That this was in the Nature of a Release of a Possibility of what the Father would die worth, which could not then be known, or he might lay out his whole Personal Estate in Land, and then there would be nothing for the Custom to operate upon; and therefore this Release of a Possibility in the Case of a Child to its Parent, ought not to be conclusive, especially as she was under Coverture, and the Husband in regard to his Wife, was under the same Awe and Influence.

But notwithstanding these Reasons, my Lord *Chancellor* was clear of Opinion, that the Plaintiffs had no Pretence in the World for this Bill; that this Release being executed only by the Husband and Wife, there

was nothing under the Father's Hand, whereby the certainty of this Provision for them appeared in Writing, and then by the Custom they were expresly barred to make any Demand of more.

That if the Plaintiffs, who are the very Persons who gave this Release should be let into it aside, it would be a direct Fraud on the Father, for he was not obliged to give them a Groat; and when he becomes so far reconciled, as to give them this 100 *l.* upon consenting to give this Release, and the Husband covenants to accept it in full of his Wife's customary Share; that if they should now be admitted to set all this aside, it would be a direct Fraud on the Father, who if it had not been for this Release, might have laid out his Personal Estate in the Purchase of Land, and thereby have prevented entirely the Plaintiffs from the least Pretence of any further Share; and that, perhaps, the Reason of his not doing of it might be in Confidence of the Plaintiffs being barred from demanding any more.

That this *Tittle Tattle* of his not leaving them less, was of no Consequence, when he was not obliged to have given them any Thing.

And he said, this Custom of the City of *London* was the Remains of the old Common Law, that a Man could not give away any Part of his Estate without the Consent of his Children, and is so taken Notice of in *Bracton*; but it being found extreamly inconvenient and hard, it was by the tacit Consent of the whole Nation abrogated and grown into Disuse, for what Law has been ever made to repeal it; but in the City of *London*, where the Mayor and Aldermen had the Care of Orphans, they by that sole Authority and Power have preserved this Part of the Common Law in *London*, which is disused and disapproved every where else.

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And

And he said, this differed from the Case of *Frederick* and *Frederick*, where the Father had expresly covenanted to make himself a Freeman of *London*, which was intended to let in the Children of that Marriage into the customary Share, as a Provision for them; and he, tho' frequently applied to for that Purpose, refused to do it, which turned the Fraud on his Side; and so the Bill was dismissed, save only, that the Defendants were to give Security to answer the Interest of the 400 *l.* during the Plaintiffs Wife's Life.

Anonymous.

Case 358. *Eodem Die.* In Court Ld *Chancellor.*

A seised of an Estate of 600 *l. per Ann.* devises 300 *l. per Ann.* to an Infant, whose Father was his Heir at Law, and the other 300 *l. per Ann.* he devises to the Father, for his Care in looking after the Son's Estate, 'till he should come to the Age of 21; the Father dies, leaving the Son six Years of Age, having by Will devised this 300 *l.* to his Wife, and desired her to save what she could out of it for a Portion for his Daughter, and appointed her Guardian of his Son, this 300 *l. per Ann.* does not determine by the Father's Death; but the Wife shall have it 'till the Son arrives to the Age of 21.

ONE seised of an Estate of 600 *l. per Ann.* devised 300 *l. per Ann.* of it to an Infant, whose Father was his Heir at Law; and the other 300 *l. per Ann.* he devised to the Father, for his Care and Pains in looking after the Son's Estate, 'till he should come to the Age of 21 Years; the Father died, leaving his Son an Infant of six Years of Age; but by his Will devised this 300 *l. per Ann.* to the Defendant his Wife, and desired her to save what she could out of it as a Portion for his Daughter, and appointed her Guardian of his Son; and the only Question was, Whether the Wife was to have the 300 *l.* a Year, 'till the Son came to the Age of 21 Years, or whether this was such a Personal Trust in the Father, as died with him.

Lord *Chancellor* was clear of Opinion, that the Father being Guardian by Nature, would have been bound to have taken Care of his Son, and of his Estate, tho' he had not been so appointed; and that he being so appointed, was the only Person that could extend his Care as a Guardian after his own Death; that he had by Law a Power to appoint a Guardian over his Children,

and

and tho' he was now dead, yet he ſtill by the Guardian which he had appointed, took Care of his Son; and therefore, this 300 *l. per Ann.* being given him, 'till his Son ſhould attain the Age of 21 Years, did not determine by his Death, but was an abſolute Intereſt in him for that Time, which he might diſpoſe of as he thought fit; and that it could not determine neither, by his Wife's Death, unleſs in Caſe of any Determination thereof, for want of Care of the Son, or of his Eſtate, which when that happened to be the Caſe, the Son might complain.

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